(1)

Supreme Court, U.S.
FILED

9 92064 JUN 22 2000

No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

BEATRICE A. ARMENDARIZ,
Petitioner,

v.

THE CITY AND COUNTY OF DENVER,
a municipal corporation, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL A. BACA *
1009 GRANT STREET
SUITE 201
DENVER, COLORADO 80203
(303) 861-9200

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

72 pp

QUESTIONS PRESENTED

1. Did petitioner present sufficient evidence below to establish a prima facie case on all her claims of discrimination?

2. Did petitioner present sufficient evidence below to create a genuine issue regarding whether the respondents' proffered reasons in response to the petitioner's established prima facie cases on her claims of national origin discrimination, race discrimination, sex discrimination, equal pay discrimination, age discrimination and retaliation were pretextual in order to avoid summary judgment?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceeding before the Tenth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv,v,vi,viii
Opinion Below	viii
Statement of Jurisdiction	viii
Statutory Provisions Involved	viii
Statement of the Case	1
A. Background of Material Facts	1
B. The Proceedings Below	7
Reasons for Granting the Writ	8
I. The Petitioner Presented Sufficient Evidence Below to Establish a Prima Facie Case on All Her Claims of Discrimination	8
II. The Petition Should Be Granted Because the Opinions and Rulings Below Required Petitioner to Establish More Than Was Required Under McDonnell. Douglas v. Green to Demonstrate That the Respondents' Proffered Reasons in Response To Petitioner's Established Prime Facie Cases of National Origin Discrimination, Race Discrimination, Sex Discriminations, Equal Pay Discrimination, Age Discrimination, Disability Discrimination and Retaliation Were Pretextual	9
Conclusion	30

TABLE OF CITATIONS

Cases Cited:

Applied Genetics Int'l., Inc., v. First Affiliated Securities, Inc., 912 F.2d 1238 (10th Cir. (1990) 10

Adickes v. S.H. Kress & Co., 389 U.S. 144 (1970) 10

Allen v. McCurry, 449 U.S. 90, 94 (1980) 29

Anderson v. Creighton, 483 U.S. 635, 638 (1987) 24

Bee v. Greaves, 744 F.2d 1287 (10th Cir. 1983) 10

Blue Circle Cement, Inc. v. Board of County Commissioners, 27 F.3d 1499, 1503 (10th Cir. 1994) 11

Burrus v. United Tel. Co. Of Kans., Inc., 683 F.2d 339, 343 (10th Cir. 1982) 24

Candelaria v. EG&G Energy Measurements, Inc., 33 F.3d 1259, 1271 [10th Cir. 1994] *cert denied*, 117 S.Ct. 684 (1997) 24

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10

Chavez v. City of Arvada, 88 F.3d 861, 866, (10th Cir. 1996) 23

Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1381
(10th Cir. 1994) 12,21

Concrete Works, Inc. v. City and County of Denver,
36 F.3d 1513 (10th Cir. 1994) 11

Connor v. Schnuck Mkts., Inc., 121 F.3d 1390, 1398
(10th Cir. 1997) 23

Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.,
938 F.2d 1105, 1110 (10th Cir. 1991) 11

EEOC v. Flasher Company, 98 F.2d 1312, 1319
(10th Cir. 1992) 18

Hutton v. Foremost Financial Service Corp.,
724 F.2d 112, 116 (10th Cir. 1983) 10

McDonnell Douglas Corp. v .Green,
411 U.S. 792 (1973) 9,11,13,16,20,21

McKnight v. Kimberly Clark Corp.,
149 F.3d 1125, 1128 (10th Cir. 1998) 12

Monroe v. Pape, 365 U.S. 167, 180 (1961) 29

Morgan v. Hilti, Inc., 108 F.3d 1319, 1323
(10th Cir, 1997) 12

Pollar v. Columbia Broadcasting System,
368 U.S. 464 (1962) 10

Panis v. Mission Hills Bank, N.A.,
60 F.3d 1486, 1489 (10th Cir. 1995) 10

Reynolds v. School District No. 1,
69 F.3d 1523, 1532 (10th Cir. 1995) 28

St. Mary's Honor Center v. Hicks,
509 U.S. 502, 507 (1993) 12

Texas Dep't of Community Affairs v. Burdine,
450 U.S. 248 (1982) 12

Thomas v. Denny's, Inc.,
lll F.3d 1506, 1513-14 (10th Cir. 1997) 28

Trujillo v. University of Colorado Health Sciences Center,
157 F.3d 1211, 1215 (10th Cir. 1998) 12

University of Tennessee v. Elliott,
478 U.S. 788 (1986) 28,29

Weinberger v. Hyson, Wescott & Dunning,
412 U.S. 609 (1973) 10

White v. York Int'l Corp.,
45 F.3d 357, 360-61 (10th Cir. 1995) 24

STATUTES CITED:

28 U.S.C. §1254 (1) viii

29 U.S.C. §255(a) 26

42 U.S.C. §1981 7,21,27,28

OTHER AUTHORITIES CITED:

Fed. R. Civ. P. 56(c) 10

APPENDIX

Appendix A - Order and Judgment - Tenth Circuit Court of Appeals dated March 24, 2000 . . . . . 1a

Appendix B - Order Granting the respondents' motion for summary judgment - United States District Court for the District of Colorado dated December 3, 1998 . . . . . 8a

Petitioner, Beatrice A. Armendariz, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the ruling of the United States District Court for the District of Colorado in this case granting the respondents summary judgment.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter is unreported but is contained in the Appendix (App. A at 1a). The ruling of the district court is contained in Appendix (App. B at 8a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 24, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions ***per se*** involved in this petition as this petition concerns the issues of the evidence required to establish a prima facie case of discrimination and the level of evidence required to create a genuine issue of pretext in response to the respondents' proffered explanations that their employment decisions were legitimate and non-discriminatory.

STATEMENT OF THE CASE

A. Background of Material Facts:

The following factual background is a summary of evidence presented below by the petitioner in the form of her answers to interrogatories, deposition responses, and affidavit in support of her opposition to the respondents' motion for summary judgment.

The petitioner is a Native American/Hispanic female forty-six years of age at the time of the filing of her Complaint in the district court who suffers from the mental maladies of depression and situational anxiety disorder. The petitioner is a former employee of the respondent City and County of Denver (hereinafter "City") having commenced her employment with the City as a Social Worker in 1983. In 1985 the petitioner transferred to a newly-created City agency which was named the Office of Employee Assistance (hereinafter "OEA") as a Social Worker.

The petitioner worked in the OEA office as a Social Worker until the then Director of OEA, a white male, involuntarily separated from his employment in early 1994. The petitioner was then appointed as the Acting Director of OEA on January 24, 1994 and served in such acting capacity from that date to the date that she was appointed as the permanent Director on March 2, 1995. The petitioner was a Career Service employee subject to the rules of the Career Service Authority (hereinafter "CSA") which is, in essence, the personnel department for the City which, in addition to other formal personnel functions, promulgates the rules governing employees holding Career Service status, entertains employee grievances and considers appeals of demotions, suspensions and terminations.

During the period that the petitioner served as the Acting Director and later as Director until the date of her removal from the position of Director on August 21, 1995, and contrary to rule, custom and practice, she was never given formal written job performance evaluations nor was any performance planning document with stated job criteria ever given to her.

The petitioner received the permanent appointment as Director of OEA pursuant to a nation-wide search process which was conducted in late 1994 wherein numerous applicants were considered for the Director position. The petitioner, along with the other applicants, was subjected to a rigorous three-phase interview process. Respondent Wallach and Theresa Donahue, both assistants to the Mayor, interviewed petitioner and other finalists in the last phase of the selection process. Respondent Christopher Weimer (hereinafter "Weimer") also submitted an application for the Director position in late 1994 but was eliminated from consideration during the first phase of the search process as he was deemed not to be qualified for the position.

The Petitioner accepted the offer to become the Director of OEA on March 2, 1995. When first considering the offer, the petitioner voiced her dissatisfaction regarding the salary being offered to her in her pre-appointment discussions with Wallach and Donahue several days before her acceptance on March 2, 1995. The petitioner specifically advised them that had she been a white male she would have been offered a considerably higher salary than that which was being offered.

During the course of petitioner's service as the Acting Director, an attempt was made by Wallach to change the title

of the position to Program Administrator which title and position were at a lower pay grade and job classification than the position of Director pursuant to the CSA's job classification system. When this attempt was made, the petitioner contacted a representative from the CSA who recommended to her that she resist or not accept a change in the title of the position. The petitioner then wrote a memo on May 5, 1994 to Donahue and then, and only then, did she receive a 10% increase in salary. Additionally, during the course of her service as the Acting Director, the petitioner was involved in the development of the upcoming OEA budget and the position of Director was budgeted for a salary in the range of $55,000 per year. The salary that was offered to the petitioner was $44,000 per year which was only 10% higher than the salary that she was then currently earning as a Social Worker. On March 2, 1995 the petitioner reluctantly agreed to accept the position at a salary of $44,000 per year.

The CSA rules provided for a salary increase to a certain step in the salary range for the job classification of Director when a person was promoted from a lower classification such as Social Worker which could have resulted in the petitioner receiving a salary of $53,220 per year at the time she was appointed to the Director position on a permanent basis. Instead, the petitioner's salary was raised only to $44,000 per year.

During the period of time that the petitioner served as the Acting Director and Director of OEA, she was supervised by Wallach. During the course of his supervision of the petitioner, Wallach and the petitioner had only three to four face-to-face meetings regarding the functions and operations of the OEA and, later on, two meetings relating to her removal as the Director. In addition, the petitioner had approximately six to seven telephone conversations with

Wallach relating to the business of the OEA and a problem OEA employee by the name of Gloria Hitchings.

Subsequent to her permanent appointment as Director, pursuant to CSA rules, the petitioner was required to serve a promotional probationary period of six months duration and which could be extended at anytime by the supervisor pursuant to CSA rules. Pursuant to the rules, an employee could be returned to his or her former position at anytime at the discretion of the supervisor. However, such return to the former position could not be based upon reasons of discrimination and/or retaliation which was prohibited by the CSA rules. If an employee's promotional probationary period was to be extended, the approval of the Personnel Director for the City was required before such extension could legally become effective and binding.

On July 19, 1995 Wallach, in violation of CSA rules, attempted to extend the probationary period of the petitioner without first obtaining the necessary approval from the Personnel Director. The petitioner challenged Wallach's illegal action and he later obtained the approval for the extension of petitioner's probationary period from the Personnel Director on July 24, 1995.

Immediately prior to Wallach's decision in July 1995 to extend the petitioner's probationary period, she had a heated meeting with him regarding an allegation made by him accusing her of conduct constituting a breach of confidentiality contrary to the code of ethics to which she was bound as a licensed counselor. During the course of this meeting the petitioner stated to Wallach that his accusation was false and further that he was discriminating against her and harassing her. The petitioner filed a grievance against him with the CSA on July 25, 1995 with regard to the extension of her

probationary period and the allegations that she had violated her ethical code of conduct. Although the petitioner did not specifically state in her grievance with the CSA that she was being discriminated against by Wallach, she directly verbally advised him on July 14, 1995 that he was discriminating against her. Additionally, shortly after Wallach extended the petitioner's probationary period, she filed another grievance with the CSA contesting his action of extending her probationary period. Finally, Wallach then proposed to place the petitioner on a "probation within probation" which status was unknown under CSA rules but petitioner rejected this proposal. Petitioner asserted that this proposal was merely an attempt by Wallach to ward off the petitioner's grievance.

During the period from July 2, 1995 to August 21, 1995 when Wallach removed the petitioner as Director of OEA and returned her to her former position of Social Worker, Wallach alleged that petitioner had failed to perform the duties and responsibilities of her position with regard to matters involving developing the budget, submitting staff job descriptions, correcting leave accrual and leave deduction records which were left in disarray by the petitioner's predecessor and the management of a petty cash account. Wallach contended that he sent the petitioner various memos regarding her alleged deficient job performance some of which memos she denied ever receiving. The petitioner further denied that she was performing her job duties and responsibilities at a level which was unsatisfactory as Wallach alleged and asserted that her performance was satisfactory.

The petitioner was then removed as the Director of OEA on August 21, 1995 and replaced by respondent Weimer, a white male, substantially younger than the petitioner, at the direction of Wallach. As indicated above, Weimer had previously been determined to be unqualified for

the Director position during the above-referenced nation-wide search in late 1994 - early 1995. Upon her forced return to the position of Social Worker, Weimer then became petitioner's immediate supervisor and he immediately removed two significant job responsibilities from her which she had previously performed as a Social Worker prior to her appointment as the Acting Director dealing with drug and alcohol and violence in the workplace issues. The petitioner held a state license in drug and alcohol counseling and was a member of a select committee which developed and drafted the City's policy on violence in the workplace. The petitioner, based upon her background, experience and licensure was the most qualified member of the small professional staff of OEA. Despite her imminent qualifications, Weimer prevented the petitioner from performing these two significant functions which she had performed.

Subsequent to her return to the Social Worker position, the petitioner suffered a physical injury in an off-duty motorcycle accident and began to suffer from the mental disorders of depression and situational anxiety disorder which resulted in her missing a considerable amount of work.

The petitioner exercised her rights to leave under the Family Medical Leave Act and, upon exhausting her leave limitations under that statute, sought additional leave and provided to Weimer medical documentation from her treating physicians to support her leave requests. Weimer refused to accept the medical documentation provided to him by the petitioner's treating physicians and created a special medical documentation form for use in the petitioner's case regarding her requests for medical leave. This form did not exist prior thereto but was given to the petitioner by Weimer to be filled out by her treating physicians. Each time that the petitioner's treating physicians provided the medical documentation,

Weimer concluded that the information provided was insufficient. The petitioner then executed a release of medical information form authorizing her treating physicians and therapist to release her medical information to Weimer in the event that he needed to discuss her medical condition directly with her treating physicians to clear up any questions which he may have had. However, Weimer never chose to have any direct communication with the petitioner's treating physicians but instead found her medical documentation to be insufficient, found her to be in violation of leave policies, suspended her without pay for a period of three weeks and subsequently terminated her employment on September 12, 1997.

B. The Proceedings Below:

The petitioner commenced this action on December 19, 1997 in the United States District Court for the District of Colorado, alleging that she was unlawfully discriminated against regarding the terms and conditions of her employment and subsequently wrongfully terminated by respondents because of her race, sex, national origin, age and disability status in violation of 42. U.S.C. § 1981; Title VII of the Civil Rights of 1964; the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990. The petitioner further alleged that she was unlawfully retaliated against in violation of all the above-referenced statutes.

On February 18, 1998 the respondents filed their First Amended Answer to the petitioner's Complaint generally denying petitioner's allegations and additionally asserting several affirmative defenses. After the completion of discovery, the respondents filed their motion for summary judgment along with a brief and supporting document s. The

petitioner submitted her brief in opposition to the respondents' motion along with supporting documents and affidavit. The respondents filed their reply brief and on October 8, 1998 the district court took respondents' motion for summary judgment under advisement after receiving oral argument from counsel.

On December 3, 1998 the district court issued an order granting the respondents' motion for summary judgment in its entirety dismissing all of the petitioner's claims. On December 7, 1998 judgment was entered against petitioner. A timely notice of appeal was filed by the petitioner on January 4, 1999.

After written briefs were filed by the parties and oral argument received on January 18, 2000, the Tenth Circuit Court of Appeal issued its Order and Judgment on March 24, 2000 affirming the decision of the district court. It is from that Order and Judgment that the plaintiff seeks review in this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER ESTABLISHED PRIMA FACIE CASES OF DISCRIMINATION ON ALL OF THE CLAIMS WHICH SHE ADVANCED.

The district court found, or at least assumed for purposes of argument, that the plaintiff had established prima facie cases on her claims with the exception of her claims of being excluded form the loop of information within the OEA office, given unfair performance evaluations, and her claim of disability discrimination and retaliation. The petitioner submits that she provided sufficient evidence to establish

prima facie cases on all claims.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS AND RULINGS BELOW APPARENTLY REQUIRED PETITIONER TO ESTABLISH MORE THAN WAS REQUIRED UNDER MCDONNELL DOUGLAS V. GREEN TO DEMONSTRATE THAT THE PROFFERED EXPLANATIONS OF THE RESPONDENTS IN RESPONSE TO THE PETITIONER' S ESTABLISHED PRIMA FACIE CASES OF DISCRIMINATION AND RETALIATION WERE MERELY A PRETEXT FOR UNDERLYING DISCRIMINATION AND RETALIATION.

As indicated above, the district court granted respondent's motion for summary judgment finding that the petitioner had failed to establish that the respondents' proffered explanations in response to the petitioner's established prima facie cases of race discrimination, national origin discrimination, sex discrimination, age discrimination, disability and retaliation were merely a pretext for underlying discrimination and retaliation. Tile ruling of the district court was affirmed by the Court of Appeals on all claims with very little discussion and simply an adoption of the district, court's findings. The petitioner submits that she submitted sufficient evidence of pretext on all her claims sufficient to create genuine issues to avoid summary judgment and require that said claims be submitted to a jury for determination.

ARGUMENT

A. Legal Standard:

Fed. R. Civ. P., Rule 56(c) states that summary judgment is proper only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Federal courts are in agreement that the party moving for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts which would entitle him to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Weinberger v. Hynson, Wescott. & Dunning, 412 U.S. 609 (1973); and Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Furthermore, before summary judgment may enter, there must be no doubt from the evidence with all possible reasonable inferences drawn in favor of the non-moving party that no genuine issue of material fact remains for trial and that tho moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, supra at 322. See also Bee v. Greaves, 744 F.2d 1287, 1296 (10th Cir. 1984) and Hutton v. Foremost Financial Service Corp., 724 F.2d 112, 116 (10th Cir. 1983). To satisfy the burden placed upon the party bringing the motion, the movant must make a showing that it is quite clear what the truth is and that it excludes any real doubt as to the existence of any genuine issue of material fact. See Pollar v. Columbia Broadcasting System, 368 U.S. 464 (1962) and Adickes v. S.H. Kress & Co., supra.

The Court of Appeals was required to review de novo the district court's granting of summary judgment in favor of respondents and apply the same standard that was employed by the district court. See Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1489 (10th Cir. 1995) and Applied Genetics Int'l.Inc. v. First Affiliated Securities. Inc., 912 F.2d 1238,

1241 (10th Cir. 1990). With the de novo standard of review to be applied, the Court of Appeals was to examine the pleadings, depositions, answers to interrogatories, together with the affidavits to determine whether there was no genuine issue as to any material fact before summary judgment could enter. See Panis v. Mission Hills Bank. N.A., supra at 1490. In addition to the factual record before the Court, all reasonable inferences which can be drawn from the facts must be inferred in the light most favorable to the non-moving party. See Concrete Works, Inc. v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994); Blue Circle Cement, Inc. v. Board of County Commissioners, 27 F.3d 1499, 1503 (10th Cir. 1994) and Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F,2d 1105, 1110 (10th Cir. 1991).

B. McDonnell Douglas Analysis

Employment discrimination cases are to be analyzed under the three-step, burden-shifting analysis first set forth in this Court's decision in McDonnell Douglas v. Green, 411 U.S. 792 (1973). The first step of the analysis is to ascertain whether the petitioner established prima facie cases of discrimination and retaliation under the theories which she advanced. As indicated above, the district court held that the petitioner had established or at least assumed that she established prima facie cases under the theories she advanced with the exceptions mentioned above and the Court of Appeals did not disturb these rulings on review.

As indicated above, this action was based upon mixed motive theories, namely, race discrimination, national origin discrimination, age discrimination, sex discrimination, disability and retaliation. Regardless of the specific theory of discrimination, the McDonnell Douglas analysis applies.

See Trujillo v. University of Colorado Health Sciences Center, 157 F.3d 1211, 1215 (10th Cir. 1998) - race discrimination; Morgan v. Hilti Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) - disability discrimination; McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998) - age discrimination; and Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1381(10th Cir. 1994) - gender discrimination and retaliation.

If the petitioner succeeds in establishing a prima facie of discrimination, a rebuttable presumption then arises which requires the respondent to meet its burden of production by articulating a legitimate, non-discriminatory business reason for its employment decision. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1982). In order to meet this burden of production, the respondent must produce admissible evidence which, if taken as true, would permit the conclusion that there was a non-discriminatory reason for the adverse actions taken. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). If the respondent meets its burden of production, the petitioner is then given the opportunity to demonstrate that the proffered reason was not the true reason for the adverse employment actions but merely a pretext for underlying discrimination or retaliation. In order to establish such pretext, the petitioner must either directly persuade the trier-of-fact that a discriminatory reason, more likely, motivated the respondent or indirectly by showing that the respondents' proffered explanation is unworthy of credence. See Burdine, 450 U. S. at 256. Indirect evidence of pretext can be shown by establishing that the respondents' proffered reasons suffer from weaknesses, implausibilities, inconsistencies or contradictions from which a reasonable fact-finder could rationally find the explanation unworthy of credence and therefore, infer that the respondent, did not act for the reasons they stated. See Morgan v. Hilti, Inc., 108

F.3d 1319, 1323 (10th Cir. 1997).

Under the McDonnell Douglas method, the petitioner must first establish a prima facie case of discrimination which is shown by establishing the following: (1) that she was a member of a protected class; (2) that she was qualified for the position and performing satisfactorily; (3) that she suffered an adverse employment action; and (4) that she was replaced by a person outside the protected group.

In this action, the petitioner complained of several adverse employment actions taken against her by the respondents which included the following: (1) the return from "promotional probation" to her former position which the petitioner asserts is more accurately characterized as a demotion; (2) the removal of duties which she previously performed as a Social Worker; (3) the exclusion from the "loop of information" and unwarranted criticism of her; (4) the receipt of job performance reviews which were not commensurate with her actual performance; (5) the harassment regarding the medical documentation she supplied to support her medical leave requests: (6) the suspension without pay and (7) the termination of her employment. In its analysis of the petitioner's claims, the district court examined each of the petitioner's claims on an incident-by-incident basis and the Court of Appeals simply adopted, without specific discussion, the district court's factual analysis. In this petition the petitioner will, likewise, address her claims on such incident-by-incident basis.

Return from Promotional Probation - Demotion

As indicated in the factual summary above, the petitioner was returned to the position which she previously held (Social worker) from the position of Director of OEA.

The respondents characterize such action as a "return from promotional probation". The petitioner contended that such action was, in fact, a demotion. The district court expressed some doubt whether the petitioner's "demotion" was really an adverse employment action and whether the petitioner was meeting the legitimate expectations regarding her duties and responsibilities. Nonetheless the district court assumed that the petitioner had established a prima facie case of discrimination.

The respondents articulated that the basis for their decision to return the petitioner to the position of Social Worker was her failure to develop budget documents and job descriptions for staff positions; failure to ensure that leave accrual and leave deductions were properly recorded for OEA employees; and failure to properly manage the OEA's petty cash account. The district court determined that all of these reasons could legitimately account for the decision to return the petitioner to the position of Social Worker. The district court then concluded that the petitioner failed to establish that the proffered explanations of the respondents were pretextual stating that she produced no evidence that the respondents' decision was discriminatory by, for example, failing to cite any derogatory comments or actions based upon her race, sex, age or national origin. The district court was obviously looking for a "smoking gun" (evidence of direct discrimination). The district court simply concluded that the petitioner's allegations were simply that - allegations. "Smoking gun" evidence rarely exists in employment discrimination cases and the petitioner should not have required to produce such evidence in order to prove her case.

In response to the respondents' proffered explanations, the petitioner categorically denied that she failed to provide the necessary staff job descriptions to Wallach and asserted

that she had, in fact, provided the staff job description to Wallach in a timely manner.

With regard to the budget matters, petitioner properly advised Wallach and the City Budget Office of her need for additional staff in order to compile the budget information in a timely manner and she ultimately provided the information. In addition, the petitioner categorically denied that she received some of the memos which Wallach claims that he sent to her covering such matters which disputes clearly raise genuine issues of material facts. The petitioner also asserted that the OEA staff leave records and petty cash records were left in disarray by her predecessor and she requested assistance in the form of an audit. The petitioner further asserted that explanations which she offered to Wallach were never questioned or rejected by him. She also asserted that she attempted to resolve the petty cash account issues with Wallach but he would take no action on her suggestions or proposals.

As indicated in the petitioner's affidavit, she was never given the benefit of a performance planning session at the onset of her service as the Director of the OEA which clearly defined the criteria by which her performance would be measured. Furthermore, the petitioner never received written performance evaluations during her service as the Director or as the Acting Director. The petitioner stated in her affidavit that she received minimal supervision from Wallach and also stated that the OEA was frought with understaffing problems which required the petitioner to wear "many hats" to the point where the she was even performing clerical functions which would not normally be expected to be performed by an administrator.

The respondents also asserted that her demotion was the result of her alleged attempts to circumvent Wallach's supervisory authority and alleged deficient interpersonal skills with regard to her interaction with staff employee Gloria Hitchings. In her affidavit the petitioner denied any attempt to circumvent or usurp Wallach's supervisory authority and also denied any interpersonal problems employee Hitchings and further that she harbored no ill will towards employee Hitchings as evidenced by the fact that she even personally co-signed on a loan application of employee Hitchings with the Municipal Credit Union.

The respondents continually cited the circumstances regarding the Mayor's personal donation of sick leave to Ms. Hitchings suggesting that the petitioner somehow had a problem with the Mayor offering part of his accumulated sick leave for use by Ms. Hastings. However, the petitioner clearly stated in her affidavit, that she has no objection to the Mayor's action but she simply objected to the "last minute" manner in which she was forced to process the necessary paperwork to accomplish the donation of the sick leave and contended that the "eleventh hour" manner of processing the paperwork was in violation of the policy of the Office of the Auditor as she understood it.

The totality of the circumstances suggests that the petitioner was performing in a satisfactory manner. It is also clear that her replacement, Weimer, was a white male, six years younger than the petitioner which clearly establishes the fourth element of petitioner's age claim. Further, the fact that Weimer was non-Hispanic established a fourth element of her national origin claim.

The petitioner asserts that she has established a prima facie cases under the McDonnell Douglas analysis and the

reasons offered for the adverse employment actions by the respondents are clearly unworthy of belief. Texas v. Department of Community Affairs v. Burdine, supra, at 256.

Reassignment of Duties

The petitioner asserted that she was treated in a discriminatory manner when she was returned to the position of Social Worker in that the responsibilities which she had previously performed as a Social Worker were removed from her, namely, the responsibility of handling drug and alcohol issues and the training responsibilities relating to the city's violence in the workplace policy. The district court below indicated its skepticism that the reassignment of these duties rose to the level of an adverse employment action but decided to assume that the petitioner had established her prima facie case.

The district court below simply accepted as legitimate Weimer's self-serving explanation for the removal of these duties as an exercise of his business judgment. While the petitioner is mindful that it is not the function of the courts to "second-guess" each business decision of an employer, the fact remains that the reasons stated by Weimer were hollow as the petitioner was clearly the best qualified staff member to perform such duties in light of her past experience and expertise in these areas. The district court below simply stated that petitioner's co-worker Schefe also held a masters degree as did the petitioner concerning the issue of alcohol and drug responsibility and that Weimer wanted to demonstrate how serious the OEA treated the issue of violence in the workplace by assuming himself the duties and responsibilities of the violence in the workplace training. These explanations do not address the issue of "why?" Since the petitioner is entitled to all reasonable inferences

which could be drawn from such actions, a genuine issue is thus created. The district court allowed the respondents to insulate themselves from scrutiny by simply accepting their explanations that it was simply an exercise of business judgment.

The petitioner recognizes under the EEOC v. Flasher Company, 98 F.2d 1312, 1319 (10th Cir. 1992) that employers are not required to treat all of their employees with absolute equality. The respondents simply stated that "there are legitimate nondiscriminatory reasons" as to why the petitioner was not allowed to perform these duties. However, the respondents failed to support their argument that the failure to assign these tasks to the petitioner were either legitimate or non-discriminatory. It is clear that she was the best qualified person within the office to perform these duties and none of the duties were assigned to her.

Claims Exclusion from the Loop of Information and Unwarranted Criticism

The petitioner asserted that she was intentionally left out of the "loop of information" and the respondents responded with the assertion that Weimer conducted weekly staff meetings. The petitioner disputed the assertion that Weimer had weekly staff meetings on an ongoing basis and subjected the petitioner to unwarranted criticism when she voiced her opinion at a staffing session where it would normally be expected that, as a professional social worker, she be allowed to express her opinion for her colleagues' consideration. Weimer simply singled petitioner out and subjected her to unjustified criticism for expressing her opinion at the staffing session.

Claims Regarding Performance Ratings

With regards to the issue of her job performance ratings, the petitioner received a "meets expectations" rating on September 20, 1996 from Weimer which rating was comparable to a rating of "satisfactory". The petitioner contended that this rating not commensurate with her actual performance and furthermore it was the lowest rating that she had ever received during her many years of service as a Social Worker. Finally, Weimer wilfully failed to take into account laudatory written comments made by two supervisory officials outside of the OEA regarding her commendable performance in her interaction with and service provided to these two City officials and their respective agencies.

With regard to her final performance review which was substandard, the petitioner acknowledges that she had missed considerable work due to her physical injuries and her then current mental state, however, it was patently unfair for Weimer to give the petitioner a substandard rating under these exceptional circumstances in light of the physical and mental problems that the petitioner was experiencing at the time which caused her to miss considerable work. Petitioner contended that Weimer gave her this substandard rating to "document" his efforts to terminate her.

Claim of Harassment Regarding the Quality of Medical Documentation

The petitioner claimed that she was harassed by Weimer regarding the quality of the medical documentation submitted by her treating physicians in her effort to support her requests for leave. As indicated above, upon exhausting her leave entitlement under the Family Medical Leave Act, it became necessary that she request further leave. Weimer

refused to accept or honor the statements from petitioner's physicians due to the fact that "every 'i' was not dotted and 't' was not crossed." It is clear from the events surrounding the issue of the quality of the petitioner's medical documentation that Weimer was basically being inflexible with the petitioner regarding the medical documentation submitted by her physicians over which she had little control. The matter of Weimer's inflexibility and harassing technique was made clearly evident by one of petitioner's treating physician's written remark to Weimer requesting him to refrain from requiring him to repeatedly fill-out these "ridiculous forms" to support the petitioner's request for leave. Weimer's inflexibility and harassing attitude toward petitioner is also evident from the fact that he never bothered to contact any of the petitioner's physicians directly to have answered any questions which he may have had concerning the petitioner's condition. Further evidence was undisputed that Weimer created a "special" form and required the petitioner to fill out this form that had never been used in the past.

Suspension and Termination Claims

With regard to the petitioner's claim of the unjustified three-week suspension, it is true that she was unable to compare herself to any similarly situated non-minority who was suspended for the same or similar conduct. However, the McDonnell Douglas, analysis is not required to be applied in such a rigid fashion as the respondents assert. The respondents asserted that there was substantial justification for the suspension as the absences were "unauthorized" since she did not tender "satisfactory" medical documentation to support her absences. However, the petitioner clearly submitted documentation supplied by her treating physicians which was sufficient to support, the absences but Weimer refused to honor the medical documentation with the supporting

recommendations supplied by her.

With respect to her termination claim, the petitioner would concede that any claim of sex discrimination would fail because she was replaced by another woman. However, the respondents assertion that her national origin claim must also fail because her replacement had a "Hispanic" surname is without merit as the respondents have failed to assert that the person who replaced the petitioner was indeed Hispanic or Native-American.

C. **Retaliation Claim**:

In order to establish a prima facie case of retaliation under Title VII, §1981, the ADEA and the ADA, the petitioner must show the following: (1) that she engaged in protected activities; (2) that she suffered an adverse employment action either after or contemporaneous with the protected activities; and (3) that a causal connection exists between the protected activity and the adverse action. See Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1381 (10th Cir. 1994). Once again, if the petitioner establishes a prima facie case of retaliation, the burden of production shifts to the employer to articulate a legitimate non-discriminatory business reason for the adverse action under the McDonnell Douglas. If the employer offers evidence of a legitimate non-discriminatory business reason, the petitioner must then persuade the trier-of-fact that a discriminatory or retaliatory reason more likely motivated the employer by an offer of direct evidence or indirectly by showing that the offered explanation is unworthy of credence.

In this action the petitioner offered evidence of several actions by her which constituted protected activities: consisting of the following:

1. She complained in March of 1995 that had she been a white male her starting salary would have been higher than that which was offered;

2. She verbally complained of discrimination and harassment directly to Wallach on July 14, 1995 and subsequently filed grievances complaining of his discrimination against her regarding the allegations against her of a breach of confidentiality, her demotion and her termination with the CSA; and

3. She filed a charge of discrimination with the Equal Employment Opportunity Commission and the Colorado Civil Rights Commission on December 7, 1995.

All of these actions are clearly protected activities within the meaning of the federal anti-discrimination statutes.

With regard to her complaint about her starting salary as the Director of OEA, the petitioner's reference to the fact that she would have been offered a higher salary were she a white male is followed by the action of Wallach and Ms. Donahue of maintaining their position that only the lower salary ($44,000 per year) would be offered to the petitioner despite the fact that the budget allowed for an annual salary for the Director position in the mid- 50's and that the CSA rules allowed a salary up to $53,220 per year.

With regard to the petitioner's verbal grievance which she made directly to Wallach concerning the allegations against her regarding breach of confidentiality, within a matter

of a few days, Wallach attempted to extend her probation contrary to CSA procedure which required the approval of the Personnel Director. Although with regard to this particular grievance, the petitioner did not specifically allege in her written grievance with the CSA an allegation of discrimination, she did, however, verbalize her contention that she was being discriminated against directly to Wallach on July 14, 1995 prior to filing her written grievance on July 25, 1995.

With regard to the petitioner's written grievance regarding the issue of the attempt to extend her probation, this action was, within a month, followed by Wallach's action of demoting the petitioner.

The respondents contended below that Weimer was unaware of the grievances which the petitioner had filed with the CSA complaining of the adverse employment actions which he had taken against her. However, as indicated in the petitioner's affidavit, it is clearly reasonable to infer that Weimer indeed had such knowledge because he had to approve the leave necessary for the petitioner as well as her witnesses from the OEA to attend the CSA hearing at which time they testified.

The causal connection is clearly shown by the timing between the protected activities of the petitioner and the adverse employment actions suffered by her. Contrary to the district court's findings, each of these protected activities is followed by an adverse employment action which is taken within a relatively short period of time after the protected activity and a short time lapse does establish a causal connection. In other words, temporal proximity, a prime indicator of retaliatory action, has been shown. Connor v. Schnuck Mkts., Inc., 121 F.3d 1390, 1398 (10th Cir. 1997);

Burrus v. United Tel. Co. of Kans., Inc., 683 F.2d 339, 343 (10th Cir. 1982); Chavez v. City Of Arvada, 88 F.3d 861, 866 (10th Cir. 1996) (citing Candelaria v. EG&G Energy Measurements, Inc., 33 F.3d 1259, 1271 [10th Cir. 1994], *cert denied,* 117 S.Ct. 684 (1997). The district inappropriately isolated each event in its findings that there was a lack of temporal proximity. However, temporal proximity is shown by the series of successive complaints immediately followed by adverse actions.

D. Petitioner's Claim of Disability Discrimination:

In order to establish a prima facie case of disability discrimination lander the ADA the petitioner must establish: (1) that she was a disabled person within the meaning of the ADA; (2) that she was qualified with or without a reasonable accommodation; and (3) that the employer terminated her because of her disability. See White v. York Int'l Corp., 45 F. 3d 357, 360-61 (10th Cir. 1995). As indicated in the medical statements provided to Weimer, the petitioner was suffering from depression and situational anxiety disorder which is a recognized impairment and that her impairment limited the major life activity of working. While it is true that Dr. Gary Gutterman, who was hired by the respondents, examined the petitioner and found her fit for duty, the petitioner's mental health care providers were stating the contrary (that she was unable to return to work) recommending that the petitioner be allowed to take further time off of work. It is also important to note that the petitioner discussed the issue of a reasonable accommodation with Dr. Gutterman of a temporary transfer from the OEA during the period of her depression and situational anxiety disorder and she was under the assumption based on her discussions with Dr. Gutterman would, in fact, discuss this reasonable accommodation with Weimer. However, no such discussion

ever took place. The respondents, once again, contended that the petitioner was terminated, not because of her disability or any other unlawful reason, but because she failed to show up for work and failed to provide adequate medical documentation to justify her absences. However, the evidence is to the contrary as petitioner did furnish adequate medical documentation to support her absences and Weimer failed to honor the documentation.

E. Petitioner's Claim of Compensation Discrimination Under Title, VII and the Equal Pay Act:

With regard to the petitioner's claim of discrimination regarding her compensation as the OEA Director, as indicated in the petitioner's affidavit, she was involved in the preparation of the budget for the OEA and the position of the Director had been budgeted for a salary in the mid-50's which had also been approved by the Budget Office. The salary of $44,000 per year offered to the petitioner was far below the approved, budgeted amount. Contrary to the respondents' assertions that the custom and practice was to offer persons promoted to the Director level a salary increase of 10%, the CSA rules authorized compensation up to $53,220 which would have been a more appropriate salary level for the petitioner. Furthermore, her replacement, Weimer, was compensated in the mid-50's and did not possess the necessary qualifications for the position of Director as evidenced by the fact that he was eliminated from consideration for the position at the time the petitioner was promoted because he did not posses the necessary qualifications. Despite the fact that Weimer was unqualified for the position, he was hired into the position at a much higher salary level, than that paid to the petitioner. Further evidence of the efforts to undercompensate the petitioner for her services as the Acting Director was

Wallach's attempt to have the position reclassified as a Program Administrator which would have placed the pay grade for the position at a much lower classification level. The respondents' argument that Weimer was not promoted but merely transferred to the position is without merit. The fact of the matter is that the petitioner performed the same duties as Weimer and was compensated at a much lower rate than Weimer. Furthermore, the petitioner possessed far more qualifications than Weimer for the position which should have justified a higher salary for the petitioner had her gender not been a consideration.

The respondents also asserted that the petitioner's inequitable compensation claim under the Equal Pay Act was time barred because of the statute of limitation for an Equal Pay Act claim is two years. However, in the case of a "willful" violation, the cause of action may be commenced within three years after the date that the cause of action accrued. See 29 U.S.C. §255(a). The actions of Wallach of compensating the petitioner at a lower rate in the face of his ability to pay her a higher rate; compensating her at a lower rate in the face of her claim that she is being discriminated against because she was not a white male; and the attempt to lower the classification of the position from that of Director to that of Program Administrator is clearly evidence of willfulness. Thus the three year statute of limitations in this instance was the most appropriate period to be applied.

F. The Defense of Qualified Immunity:

As the respondents asserted below, the court must determine whether the petitioner has presented a violation of a constitutional right. If such right has been asserted, then the court must determine whether or not the conduct of the individual respondent was "objectively reasonable" in light of

the existence of that right. See Anderson v. Creighton, 483 U.S. 635, 638 (1987). The petitioner asserted that her rights to be free from discrimination and retaliation under the federal anti-discrimination statutes invoked were violated. There is no question that the rights to equal employment opportunity, at the times relevant to the petitioner's claims, were clearly established rights during this period. The respondents asserted that their conduct was "objectively reasonable" in their dealings with the petitioner. However, in light of all the circumstances surrounding the petitioner's demotion such as the lack of administrative support and clerical assistance given to her; the failure to address the problems of the OEA when the petitioner was taking every measure to address such problems; falsely accusing the petitioner of attempts to circumvent supervisory authority; and the failure to establish objective criteria upon which the petitioner's performance would be measured is clearly conduct which is not "objectively reasonable" under the circumstances presented.

With regard to the issue of petitioner's termination, it is very apparent that the petitioner was experiencing not only physical problems but also mental and emotional difficulties yet Weimer refused to honor the recommendations of the petitioner's treating physicians and mental health care providers. Such conduct by Weimer in light of the circumstances presented, was not "objectively reasonable." Therefore, Wallach and Weimer should not be entitled to summary judgment on their claim of the defense of qualified immunity.

G. Petitioner's §1981 Claims Against Andrew Wallach

The petitioner will acknowledge that the statute of limitations for §1981 claims in the State of Colorado is two years pursuant to the Court of Appeals ruling in Reynolds v.

School District No. 1, 69 F.3d 1523, 1532 (10th Cir. 1995). The petitioner also acknowledges that the continuing violation theory often used to overcome statute of limitations defenses is not available for §1981 claims pursuant to the Court of Appeals ruling in Thomas v. Denny's, Inc., 111 F.3d 1506, 1513-14 (10th Cir. 1997). In light of these two Court of Appeals decisions, the petitioner concedes that the conduct of the Wallach prior to December 19, 1995 (two years before the date of the filing of this action on December 19, 1997) is not actionable. However, the petitioner asserts that Wallach was involved in the decision to terminate her employment as Weimer never engaged in any serious decisions without seeking the approval of Wallach. Thus the statute of limitations defense raised by the respondents has no application here.

H. Petitioner's §1981 claims Against Wallach and Weimer:

The respondents argued below that the petitioner has already litigated her racial discrimination and retaliation claims against respondents Wallach and Weimer in two separate appeals before the Denver CSA Hearing Officer without success and, therefore, the preclusion doctrine set forth in University of Tennessee v. Elliott, 478 U.S. 788 (1986) bars such claims in later federal court litigation. In this case the petitioner had a hearing on the merits before the Hearing Officer of the CSA regarding her two grievances which concerned the allegations of breach of confidentiality made against her as well as the extension of her probation and demotion from the position of Director of the OEA on August 21, 1995. The Hearing Officer decided these two grievances against the petitioner after hearing the testimony of the witnesses offered by the petitioner and the agency. With regard to the issue of the petitioner's suspension and

termination, a hearing on the merits was scheduled but never took place due the fact that Hearing Officer's denied petitioner's request for a continuance of the scheduled hearing made by her due to a family medical emergency concerning her elderly mother who was to undergo a serious surgery. In University of Tennessee v. Elliot, supra, this Court denied the doctrine of preclusion with regard to Title VII claims but granted same with regard to claims advanced under the Reconstruction Era Statutes. The Supreme Court reasoned that barring such claims in federal court served the interest of avoiding costs involved in repetitive litigation and the public's interest in conserving Judicial resources citing Allen v. McCurry, 449 U.S. 90, 94 (1980). In this action the petitioner has alleged claims under Title VII of the Civil Rights Act of 1964 therefore allowing claims brought under the Reconstruction Era Statutes does not conserve the resources of either the litigants or the court because the petitioner's companion Title VII claim would have been allowed to be litigated in federal court. See University of Tennessee v. Elliot, 478 U.S. 788 (1986) (Stevens, Brennan and Blackman concurring in part and dissenting in part.) In Monroe v. Pape, 365 U.S. 167, 180 (1961) the Supreme Court stated:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities granted by the Fourteenth Amendment might be denied by the state agencies."

The respondents' argument with regard to the petitioner's

grievances appealed to the CSA should not be adopted particularly with regard to her third grievance regarding her suspension and termination as she was callously denied a hearing on the merits of her claims of discrimination by the Hearing Officer's denial of her request for a continuance made by her due to the family medical emergency concerning the petitioner's mother who was facing knee surgery in Kansas City, Missouri and whose surgeon requested that petitioner be present during and after her mother's surgery. Therefore, the petitioner was foreclosed from litigating her contentions regarding her suspension and termination at the first level of the City's appeals process.

CONCLUSION

For the reasons and arguments stated above, the petitioner requests that her petition for writ of certiorari be granted and that this Court review the decisions of the courts below.

Dated this 22nd day of June, 2000.
Respectfully submitted,

Paul A. Baca
1009 Grant Street
Suite 201
Denver, CO 80203
(303) 861-9200
ATTORNEY FOR PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed March 24, 2000]

No. 99-1006
(D.C. No. 97-WY-2657-CB)
(District of Wyoming)

BEATRICE A. ARMENDARIZ,

Plaintiff-Appellant,

v.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE OFFICE OF EMPLOYEE ASSISTANCE, a Department of the Executive Branch of the government of the City and County of Denver; ANDREW WALLACH, individually and in his official capacity as the Assistant to the Mayor of the City and County of Denver; CHRISTOPHER WEIMER, individually and in his

capacity as the Director of the)
Office of Employee Assistance,)
)
Defendants-Appellees.)
)

ORDER AND JUDGMENT

Before **MURPHY**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **ROGERS,** Senior District Judge**.

• This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

**Honorable Richard D. Rogers, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

Beatrice A. Armendariz ("Ms. Armendariz") brought suit in the United States District Court for the District of Colorado against her erstwhile employer, the City and County of Denver, Andrew Wallach, assistant to the Mayor of Denver, and Christopher Weimer, director of the Office of Employee Assistance for Denver, alleging numerous violations of the Civil Rights Act of 1866, 42 U.S.C. §1981; the Civil Rights Act of 1871, 42 U.S.C. §1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* as amended by the Civil Rights Act of 1991; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); the Age Discrimination in Employment Act, 29 U.S.C. §621 *et. seq.;* and the Americans with Disabilities Act, 42 U.S.C. §12101 *et. seq.*

In her complaint, Ms. Armendariz described herself as a "forty-six year old female citizen of the United States of Mexican-American and Native American descent who, during the times relevant to this complaint, suffered from the mental maladies of depression and situational anxiety disorder." The defendants in due time filed an answer and an amended answer to the complaint, Discovery ensued. Thereafter the defendants filed a motion for summary judgment alleging, *inter alia,* that there was no genuine issue of material fact. In support thereof, defendants filed a *255* page memorandum brief which included extended excerpts from depositional testimony and numerous affidavits. Ms. Armendariz filed a 105 page brief in opposition to the motion for summary judgment, with numerous attachments, to which the defendants filed a 31 page reply brief. After oral argument, the district court in a 28 page order granted defendants' motion for summary judgment and dismissed all claims with prejudice. In so doing, the district court carefully analyzed the evidentiary matter before it, concluding that as to certain

claims there was no adverse employment action and holding that, as to other claims, even assuming that Ms. Armendariz had made a prima facie showing, the defendants had articulated legitimate non-discriminatory reasons for their adverse employment actions and that Ms. Armendariz had failed to show pretext. Ms. Armendariz, incidentally, was eventually terminated.

The facts of the case are fully set forth in the district court's unpublished order and need not be set forth here, since the facts are not really in dispute. In his brief, counsel for Ms. Armendariz describes the "Issues Presented for Review" on appeal as follows:

> The issues presented for review by this Court are: (1) whether the plaintiff-appellant presented sufficient evidence of pretext to create genuine issues of material fact regarding the defendant-appellee's proffered explanations for the adverse employment actions taken against the plaintiff-appellant and (2) whether the district court erred in granting the defendant-appellee's motion for summary judgment. Since these two issue are inextricably interwoven, the plaintiff-appellant will make one argument which is applicable to both.

Also in his brief for Ms. Armendariz, counsel's "Summary of the Argument", in its entirety, reads as follows:

> The plaintiff submits that she presented sufficient evidence of pretext to the court

> below to overcome the defendants' articulated reasons regarding the adverse employment actions of which she complained thus creating genuine issues for determination by a jury.

From the foregoing we conclude that the only issue in this appeal is whether in granting summary judgment for the defendants the district court erred in holding that Ms. Armendariz failed to make a sufficient showing that the defendants' articulated nondiscriminatory reasons for their adverse employment actions were, in fact, not their true reasons and were, indeed, pretextual.[1] In this regard, in *Cone v. Longmont United Hospital Ass 'n,* 14 F.3d 526, 529 (10th Cir. 1994), we spoke as follows:

> If the plaintiff satisfies the prima facie requirements under the ADEA, then the case enters the next stage. In this second stage, the burden of production moves to the defendant. The defendant has to present a legitimate nondiscriminatory reason for its action. If the defendant articulates a legitimate,

---

[1] At oral argument, counsel raised certain matter that was not raised in Ms. Armendariz' brief. We generally do not consider issues raised for the first time in oral argument and which were not raised in the briefs. *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1510 n.5 (10th Cir.) *cert. denied,* 522 U.S. 1028 (1997), *citing Durham v. Xerox Corp.*, 18 F.3d 836, 841 n.4 (10th Cir.) *cert. denied,* 513 U.S. 819 (1994). Other matter, though casually mentioned in Ms. Armendariz' brief, was not "adequately briefed," and is therefore deemed waived. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1547 (10th Cir. 1995).

> nondiscriminatory reason for its action, then the burden of persuasion moves back to the plaintiff. In this third stage of the discrimination analysis, the plaintiff must show that age was a determinative factor in the defendant's employment decision, or show that the defendant's explanation for its action was merely pretext. Failure to come forward with evidence of pretext will entitle the defendant to judgment (citations omitted).

And in the very recent case *of Perry v. Woodward,* 199 F.3d 1126, 1135 (10th Cir. 1999), we stated:

> A plaintiff relying on McDonnell Douglas bears the initial burden of establishing a prima facie case by a preponderance of the evidence. One way a plaintiff may establish a prima facie case of wrongful termination is by showing that: (1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge. If the plaintiff establishes her prima facie case, a rebuttable presumption arises that the defendant unlawfully discriminated against her. The defendant must then articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff. If the defendant is able to articulate a valid reason, the plaintiff can avoid summary judgment only if she is able to show that a genuine dispute of material fact exists as to

> whether the defendant's articulated reason was pretextual (citations omitted).

Our study of the present record leads us to conclude that the district court did not err in holding that Ms. Armendariz failed to show that the defendants proffered reasons for their adverse employment actions, which reasons Ms. Armendariz apparently concedes were facially legitimate non-discriminatory reasons, were "pretextual". On this basis, we affirm.

Judgment affirmed.

Entered for the Court

/s/_____
Robert H. McWilliams
Senior Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed December 3, 1998]

97-WY-2657-CB

BEATRICE A. ARMENDARIZ,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER, a municipal corporation; THE OFFICE OF EMPLOYEE ASSISTANCE, a Department of the Executive Branch of the government of the City and County of Denver; ANDREW WALLACH, individually and in his official capacity as the Assistant to the Mayor of the City and County of Denver; CHRISTOPHER WEIMER, individually and in his capacity as the Director of the Office of Employee Assistance,

Defendants.)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Motion for Summary Judgment. After considering the briefs, hearing oral arguments, and considering all relevant evidence, the Court **FINDS** and **ORDERS** as follows:

RELEVANT FACTS

The facts of this case span a time frame of several years and cover several alleged instances of discrimination. Plaintiff, Beatrice Armendariz, commenced her employment with the City and County of Denver ("City") in 1983 as a social worker. (Armendariz Dep. at 42-43.) She identifies herself as an "Hispanic, Indian, American female." (Armendariz Dep. at 98.) In 1985, Plaintiff laterally transferred to the City's newly formed Office of Employee Assistance ("OEA"). (Armendariz Dep. at 43-44.) In early 1994, Plaintiff was appointed Acting Director of the OEA and served in that position until March 1995. (Wallach Dep. at 10-11.)

In late 1994, the City began the process of hiring a permanent Director of the OEA. Plaintiff applied and was selected for the position over several other applicants, including Defendant Christopher Weimer. (Wallach Dep. at 9-10, 12, 18). Plaintiff accepted the offer, to begin on March

2, 1995, and entered into salary negotiations. Plaintiff voiced dissatisfaction with the salary being offered. (Armendariz Aff. ¶6.) The City hired Plaintiff according to the City's Career Service Authority practices for promoted individuals at a Step "A" through "C" pay range. (Wallach Dep. at 21-22.) If the step system required it, the Career Services Authority rules allowed a salary up to the "K" step range. (Armendariz Aff. ¶ 6.) Plaintiff received $44,000 per year, more than a 9.6% increase in compensation compared to her social worker's salary. (Def. Mot. Summ. J. Ex. F.)

The City has a personnel rule whereby employees who are promoted are placed on "promotional probation" for a period of six months. An employee can be returned from promotional probation at any time to her former position. (Wallach Dep. at 72.)

During Plaintiff's time as director, Defendant Wallach requested from Plaintiff an outline of OEA staff duties. (Armendariz Aff. ¶ 12.) Plaintiff did not respond to the memorandum, claiming she had previously sent him several memoranda covering the same matters. (Armendariz Aff. ¶ 12.) On July 11, 1995, Defendant Wallach issued another memorandum to Plaintiff, criticizing her for, among other things, her repeated failure to provide an outline of staff duties, for her tardiness in providing budget paperwork, and for the "mess" regarding OEA sick leave records. (Armendariz Aff. ¶ 15.) Plaintiff inherited the disorganized sick leave records from the previous director. (Armendariz Aff. ¶ 15.) Plaintiff admits that while she was Director there were inadequate records to reconstruct some employees' leave statements and there were monies missing from the petty cash account. (Armendariz Aff. ¶¶ 23-24.)

On July 14, 1995, Plaintiff attended a meeting to discuss an oral complaint made against her that dealt with an alleged breach of confidentiality. (Armendariz Aff. ¶ 16.) After the meeting concluded, Wallach and Plaintiff met alone and Plaintiff yelled at Wallach, accusing him of discriminating against her because she was Hispanic and Native-American. (Armendariz Aff. ¶¶ 16-17.)

Plaintiff filed a grievance on July 25, 1995 regarding the allegations of breach of confidentiality, but her grievance did not allege discrimination. (Armendariz Aff. ¶ 26.) That grievance was denied. In August 1995, Defendant Wallach made a personnel decision to return Plaintiff from promotional probation for the OEA Director position to her former position of social worker. (Armendariz Aff. ¶ 27.) Defendant Weimer, a white male, was appointed Director of the OEA on August 21, 1995 at a higher salary than Plaintiff. (Armendariz Aff. ¶ 27.) Weimer's appointment to OEA Director was considered a "transfer," not a "promotion." Consequently, he was not subject to the step "A" through "C" pay scale. Weimer continued to earn the same salary as he had earned previously. (Wallach Dep. at 92.) Defendant Weimer became Plaintiff's immediate supervisor. (Armendariz Dep. at 147.)

In response to Weimer's appointment as OEA Director, Plaintiff filed a second grievance on August 30, 1995 alleging discrimination based on race, gender and age. (Armendariz Dep. at 149.) Plaintiff established a prima facie case of retaliation, but the grievance was denied nonetheless. (Armendariz Aff. ¶39.) Plaintiff appealed and after a four day quasi-judicial hearing, the Hearing Officer found that no discrimination or retaliation occurred. (Armendariz Aff. ¶39.)

When Plaintiff returned to her social worker position, she discovered that some of her former duties had been assigned to other employees. (Armendariz Aff. ¶¶ 40-42.) At all times, however, Plaintiff was allowed to perform the most essential job duties of a social worker's position. (Weimer Aff. ¶ 6.) On September 20, 1996, Weimer completed a performance evaluation for Plaintiff and gave her a "meets expectations" rating. (Weimer Aff. ¶ 8.) Plaintiff had never received such a low rating in the past. (Armendariz Aff. ¶ 46.)

In March 1997, Plaintiff had a motorcycle accident that required surgery on her knee. After Plaintiff exhausted her sick leave, she requested and was granted Family Medical Leave from March 10 through June 2, 1997. (Armendariz Aff. ¶ 48.) On May 20, 1997, Plaintiff requested additional leave and provided a note from her doctor. (Armendariz Dep. at 256-258.) Plaintiff was advised more than once to have her doctor complete a "Physician Certification of Employee/Patient Absence" form to document what restrictions her doctor had imposed upon her that prevented her from performing her job duties. (Armendariz Dep. at 259.) However, Plaintiff's doctor never properly completed the form to Weimer's satisfaction. (Armendariz Dep. at 260.) On July 9, 1997, Plaintiff was informed that she was responsible for assuring that her doctor properly completed and returned the form by July 11. Defendants did not receive the form, so on Friday, July 18, Defendant Weimer told Plaintiff to report to work the following Monday. She did not report to work but called in sick. (Armendariz Aff. ¶ 61.)

On August 1, Defendant Weimer conducted a pre-disciplinary meeting based upon Plaintiff's approximately five

weeks of unauthorized leave. (Armendariz Aff. 63-64.) As a result of the unauthorized leave, a three-week suspension without pay was imposed on Plaintiff, from August 25 though September 12, 1997. (Armendariz Dep. at 276.) At the meeting, Plaintiff claimed for the first time that psychological, rather than physical, limitations prevented her from returning to work. She was thus placed on administrative leave (with pay) on August 4, 1997 and sent for a fitness for duty evaluation by Dr. Gutterman. (Armendariz Dep. at 279-280.) Dr. Gutterman was of the opinion that Plaintiff was capable of returning to full-duty work immediately and that her condition did not substantially limit any major life activities. (Gutterman Aff. ¶¶2-6.)

Plaintiff eventually returned to work, but was frequently absent. On or about August 20, 1997, Plaintiff provided Defendant Weimer a note from her psychologist indicating that Plaintiff needed a leave of absence for an indefinite duration. (Armendariz Aff. ¶ 82.) Another pre-disciplinary meeting was held on August 27, after which Weimer made the decision to terminate Plaintiff. Due to her absences, Plaintiff was found to have violated at least eight work rules. (Weimer Aff. ¶ 46.)

Plaintiff was the first OEA social worker to have missed so much time from work. (Armendariz Dep. at 311.) After Weimer dismissed Plaintiff, he hired another woman, Sue Carizzales, to fill Plaintiff's vacated social worker position. (Weimer Aff. ¶ 45.) Plaintiff subsequently filed another appeal with the Hearing Office of the Denver Career Service Authority. Plaintiff alleged discrimination and retaliation. Plaintiff did not attend the hearing because her mother was having knee surgery. (Armendariz Aff. ¶ 96.)

Because Plaintiff did not appear, her claims were dismissed. (Def. Mot. Summ. J. Ex. Q.) Plaintiff subsequently commenced the instant action alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), § 1981 and § 1983, and the Equal Pay Act (EPA) .

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The adverse party must set forth specific facts showing that there is a genuine issue for trial. A factual issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). When applying this standard, the court must examine the factual record and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996).

ANALYSIS

As in any discrimination case, Armendariz bears the burden of proving by a preponderance of the evidence that her employment was adversely affected by her protected class status. She can meet this burden by presenting either direct or circumstantial evidence of discriminatory intent. See, e.g., McKnight v Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998). When there is no direct evidence of discrimination, the most common way to prove employment discrimination is by the burden-shifting approach articulated

in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

To establish a prima facie case of discrimination using the McDonnell Douglas method, Armendariz must establish for each claim that (1) she is within a protected class, (2) she was meeting the legitimate expectations of her employer, (3) she suffered some adverse employment action, and (4) she has evidence from which it can be inferred that there had been more favorable treatment of similarly situated employees without the protected characteristic. See, e.g., Trujillo v. University of Col. Health Sciences Ctr., 157 F.3d 1211, 1215 (race discrimination) (10th Cir. 1998); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (disability discrimination); McKnight, 149 F.3d at 1128 (10th Cir. 1998) (age discrimination); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1380 (10th Cir. 1994) (gender discrimination).

If Armendariz succeeds in making a prima facie showing of discrimination, a rebuttable presumption of discrimination arises and the burden of production shifts to the defendants to articulate a legitimate, non-discriminatory reason for their action. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). To meet this burden, Defendants must produce admissible evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). If the defendants meet this burden, Plaintiff has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. She may succeed in defeating summary judgment either directly by persuading the court that a discriminatory reason more likely motivated the

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See Burdine, 450 U.S. at 256. Although the burden of production shifts during this analysis, Armendariz retains the burden of persuasion at all times. Id.

Pretext can be shown "by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" Morgan, 108 F.3d at 1323 (quoting Olson v. General Elec. Astrospace, 101 F.3d 947, 951-53 (3d Cir. 1996)). But Plaintiff's mere assertion that the defendant's explanation is a "pretext for intentional discrimination is an insufficient basis for denial of summary judgment." Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988) .

A. DISPARATE TREATMENT BASED ON NATIONAL ORIGIN, RACE,[1] AGE, AND SEX

Plaintiff appears to be advancing disparate treatment claims under Title VII for race (Native American), national origin (Hispanic), and sex discrimination, § 1981 for race discrimination, and the ADEA for age discrimination. Because Plaintiff does not distinguish which protected

---

[1]Because the Court finds all Plaintiff's disparate treatment claims meritless, it will not address Defendant Wallach's and Weimer's defenses to Plaintiff's Section 1981 claims.

characteristic was the cause for each alleged act of discrimination, the Court will assume that Plaintiff argues that every alleged adverse action was predicated on all her protected characteristics. The Court will thus review Plaintiff's claims on an incident-by-incident basis. Although such an analysis is burdensome, Plaintiff's "melting pot" method of pleading leaves the Court no other choice.

1. Return from "Promotional Probation"

Plaintiff identifies her return from promotional probation to her social worker position as a "demotion" and thus an adverse employment action. The Court will assume without deciding that Plaintiff has met her prima facie requirement on this claim.[2] The burden now shifts to the defendants to articulate a legitimate nondiscriminatory reason for their actions. Defendants articulate several nondiscriminatory reasons why Plaintiff was returned from promotional probation-for example, Plaintiff did not provide budget documents and job descriptions to Mr. Wallach, Plaintiff failed to ensure that leave accrual and leave deductions were properly recorded for OEA employees, and Plaintiff failed to manage the office's petty cash account. All these reasons could legitimately account for a decision to return Plaintiff from the director's position to her original position.

---

[2]The Court has some doubts whether Plaintiff's "demotion" was really an adverse employment action and whether Plaintiff was meeting the legitimate expectations of her employer.

To defeat summary judgment, Plaintiff must now prove that these reasons were pretextual. Plaintiff, however, fails to do so. Although Plaintiff offers explanations for her allegedly substandard work performance, she produces no evidence that Defendants' decision was discriminatory. For example, she cites to no derogatory comments or actions based upon her sex, race, age, or national origin. Plaintiff's allegations are just that-allegations. Because conclusory statements or unsupported assertions are inadequate to overcome summary judgment, Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1417-18 (10th Cir. 1993), Plaintiff's discrimination claim as it relates to this incident fails.

2. Reassignment of Duties

Plaintiff asserts that she was treated discriminatorily when some of her duties were reassigned after she returned from promotional probation. Plaintiff asserts that because she was far more qualified than those to whom the duties were assigned, she should have retained those responsibilities. Although the Court is skeptical that the reassignment of these duties rises to the level of an adverse employment action, once again the Court will assume without deciding that Plaintiff has established her prima facie case. Regardless, Plaintiff's claim fails for lack of evidence showing pretext.

Defendants have met their burden by producing legitimate, non-discriminatory reasons why the duties were reassigned. Mr. Weimer exercised his business judgment in reassigning Plaintiff's job duties. Mr. Weimer wanted just one person to handle drug and alcohol issues. He chose Plaintiff's co-worker who, like Plaintiff, holds a Master's Degree in

Social Work. Mr. Weimer reassigned the job duties of training on the topic of Workplace Violence to himself because he wanted to show how seriously the OEA takes workplace violence. These are legitimate business reasons.

Plaintiff acknowledges that employers are not required to treat all of their employees with "absolute, antiseptic, hindsight equality." EEOC v. Flasher Co., 986 F.2d 1312, 1319 (10th Cir. 1992). However, she fails to produce absolutely any evidence that her differential treatment, if any existed, was motivated by discriminatory animus. Consequently, Plaintiff's claim regarding this incident must fail.

3. "Exclusion from the Information Loop" and"Unwarranted Criticism"

Plaintiff contends that she was subject to disparate treatment because Mr. Weimer excluded her from receiving information and unjustifiably criticized her at a meeting. In order to establish a prima facie case, Plaintiff must prove that she was subjected to an adverse employment action. The court of appeals has "liberally defined" adverse employment action and takes a case-by-case approach to determining whether a given employment action is adverse. Jeffries v. Kansas, 147 F.3d 1220, 1231-32 (10th Cir. 1998). However, even reading Plaintiff's allegations liberally, this Court finds that exclusion from the information loop and unwarranted criticism, even if true, do not rise to the level of an adverse employment action. The criticism directed toward Plaintiff was neither severe nor pervasive. In addition, Plaintiff offers no proof that she did not receive information that she should have received. Because Plaintiff fails to meet the prima facie requirement under the McDonnell Douglas burden-shifting analysis, her

claim regarding this incident must fail. Defendants' Motion for Summary Judgment on this issue is thus **GRANTED** and Plaintiff's claim is **DISMISSED WITH PREJUDICE**.

4. Performance Reviews

To make a prima facie case that Plaintiff's negative performance appraisals were due to her protected group status, Plaintiff is required to show that (1) she belonged to a protected group; (2) her job performance was satisfactory; (3) adverse employment actions were taken against her; and (4) comparable employees who were not members of the protected group were not subjected to comparable adverse employment actions. Lucero v. Riley, 1995 WL 228301 *3 (10th Cir. 1995) (unpublished) .

The record is completely devoid of evidence regarding the second, third, and fourth elements. Plaintiff was given a "meets expectations" rating on her September 20, 1996 performance review. Although this is the lowest score Plaintiff had ever received, it is comparable to a "satisfactory" rating and cannot be construed as a negative mark. In addition, nowhere does Plaintiff claim that she did not miss considerable work due to her injuries and mental state. Further, there is nothing to show that glowing appraisals were given to younger, non-minority, or male employees who performed comparable work. Even if we assume that Plaintiff has made a prima facie case, there is no evidence from which a reasonable person could conclude that Mr. Weimer's appraisals were merely a pretext for discrimination. See, e.g., Fallis v. Kerr-McGee Corp., 944 F.2d 743, 747 (10th Cir. 1991) (holding evidence of inaccurate performance evaluation, standing alone, insufficient to show

pretext).

Therefore, the Court finds that Plaintiff did not meet the prima facie requirements to show disparate treatment under any protected group status. Defendant's Motion for Summary Judgment on this issue is thus **GRANTED** and Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

5. Harassment Regarding Medical Documentation

Plaintiff claims that she was harassed by Mr. Weimer regarding the quality of the medical documentation submitted by her physicians. To assert a claim of disparate treatment, the plaintiff must show that she was treated differently than other similarly situated employees who produced comparable medical documentation. See, e.g., Elmore v. Capstan Inc., 58 F.3d 525, 529-30 (10th Cir. 1995). The Court will assume, for the sake of this order, that Plaintiff has established a prima facie case of discrimination based upon Mr. Weimer's alleged harassment. Defendant, however, gives a legitimate, non-discriminatory reason for his action, namely, that he was following personnel rules that allowed a supervisor to investigate alleged illnesses of employees and require adequate medical certification attesting to an employee's inability to work. Plaintiff, however, does not meet her burden in showing that Weimer's proffered reason was pretextual. Plaintiff produces no evidence that other employees out on extended sick leave were not required to provide adequate medical certification or that Weimer only asked for such information because Plaintiff was a member of a protected class. Consequently, Plaintiff's claim regarding this incident must fail.

Defendant's Motion for Summary Judgment regarding this incident is thus **GRANTED**. Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

6. Suspension and Termination

Plaintiff contends that she was discriminated against when Mr. Weiner gave her a three-week suspension for repeatedly missing work. In order to establish a prima facie case, Plaintiff must show, among other things, that similarly situated non-minority employees have not been suspended for the same or similar conduct. Plaintiff must compare herself to employees of the same position with the same supervisor. Aramburu v. The Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997) . Plaintiff admits that she is unable to compare herself to any similarly situated non-minority employees. (Pl. Resp. Def. Mot. Summ. J. at 16.) Therefore, her claim on the issue of suspension must fail.

Plaintiff also claims that her dismissal from the social worker position was discriminatory. Even assuming that Plaintiff did meet the prima facie requirements, Plaintiff's claim would fail because she does not produce any evidence that Defendants' proffered reason for terminating Plaintiff was pretextual. Defendants argue that Plaintiff was dismissed because she failed to produce adequate documentation to substantiate her request for further leave, because she refused to return to work even though Dr. Gutterman determined she was fit to return, and because she was hostile and belligerent toward Mr. Weimer in her final days of employment. Plaintiff produces no evidence that any of these reasons were pretextual and that other employees who had missed long periods of work had

been treated differently than she had.

Consequently, Plaintiff's discrimination claims on the issues of suspension and termination must fail and Defendant's Motion for Summary Judgment on these issues is **GRANTED**. Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

7. Handling of Disability Insurance Claims

Plaintiff contends that she was discriminated against because of the slow handling of her disability insurance claims. However, Plaintiff produces no evidence, aside from speculating that Mr. Weimer was involved in the processing of the insurance claims, to support her claim. To establish a prima facie case, Plaintiff must show that the insurance claims of other similarly situated employees were processed more expediently than hers. She does not do this. In fact, the record is devoid of any evidence of discrimination on this issue. Defendants' Motion for Summary Judgment on this issue is thus **GRANTED.** Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

B. DISCRIMINATION BASED ON DISABILITY

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to discharge of employees and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) . To establish a prima facie case, "a plaintiff must demonstrate: (1) that she is a disabled person within the meaning of the ADA, . . .(2) that she is qualified, that is, she is able to perform the essential

functions of the job, with or without reasonable accommodation, . . . and (3) that the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability." Morgan, 108 F.3d at 1323. A person is considered disabled within the meaning of the ADA if she has "a physical or mental impairment that substantially limits one or more of [her] major life activities." 42 U.S.C. §12102(2) (A) . "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. app. pt. 1630, § 1630.2(j) (1998).

Plaintiff fails to establish a prima facie case of disability discrimination under the guidelines laid out in Morgan. First, Plaintiff has not shown that she is a disabled person within the meaning of the ADA. Plaintiff argues that her physicians indicated in the medical statements provided to Mr. Weimer that she suffered from depression and situational anxiety disorder. Plaintiff, however, offers no affidavits from medical experts indicating that her depression limited any major life activities. Plaintiff merely concludes that because she suffered from depression, the major life activity of "working" was limited. Defendants, on the other hand, produce the sworn testimony of Dr. Gutterman indicating that her depression did not substantially limit any major life activities and that she was fit to return to work. Because Plaintiff's disability is not patently obvious, and because disability determinations must be made "with respect to the individual", see Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997), Plaintiff must produce admissible evidence that her disability limited her ability to work. This

she has not done. Not only are her physician's written statements to Mr. Weimer not made under oath, they are hearsay and inadmissible to prove the truth of the matter asserted.

In addition, Plaintiff fails the third element because she produces no evidence that Defendants fired her because of her disability. Defendants maintain that they fired Plaintiff because she failed to report to work and produced inadequate medical documentation to justify her absence. Indeed, Defendants believed, based upon Dr. Gutterman's report, that Plaintiff was capable of working without restrictions. Plaintiff can hardly claim, therefore, that Defendants terminated her because of her disability when they believed that she was capable of carrying out the duties of her position.

For all the abovementioned reasons, Plaintiff fails to fulfill the prima facie requirements of a disability discrimination claim. Consequently, Defendants' Motion for Summary Judgment on this issue is **GRANTED** and Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

C. RETALIATION

In order to establish a prima facie case of retaliation under Title VII, the ADEA, Section 1981 and the ADA, Armendariz must show that: (1) she engaged in protected employee action, (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a causal connection between the protected activity and the adverse employment action. Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1381 (10th Cir.

1994); Morgan 108 F.3d at 1324; Thomas v. Denny's, Inc., 111 F.3d 1506, 1513 (10th Cir.), cert. denied, 118 S. Ct. 626 (1997). Once again, if the employee makes a prima facie case of retaliation, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343, (10th Cir.) cert. denied, 459 U.S. 1071 (1982). If the employer articulates a legitimate, non-discriminatory reason, the plaintiff must create a material issue of fact whether the proffered reason is unworthy of belief.

Plaintiff alleges that she engaged in several protected activities, namely, (1) that she complained in March 1994 that she would have received a higher starting salary if she were a white male, (2) that she filed a grievances with the Career Service Authority complaining of discrimination regarding the breach of confidentiality allegations, her demotion, and her termination, and (3) that she filed a discrimination charge with the EEOC and the Colorado Civil Rights Commission on December 7, 1995. (Pl. Resp. Def. Mot. Summ. J. at 18.)

First, Plaintiff's grievance regarding the breach of confidentiality did not allege discrimination. The filing of that grievance, therefore, is not a protected activity. Barber v. CSX Distribution Services, 68 F.3d 694 (3d Cir. 1995). However, the Court will assume without deciding that Plaintiff's remaining actions constituted protected activities that satisfy the first element of the prima facie test laid down in Cole.

The Court must now consider whether Plaintiff suffered an adverse employment action either subsequent to or contemporaneously with the protected activity. With regards

to Plaintiff's grievance regarding her dismissal, Plaintiff fails to allege that any adverse employment actions occurred conteraporaneousiy or subsequent to her dismissal from employment. Consequently, Plaintiff's retaliation claim regarding her dismissal cannot survive.

However, the Court will once again assume without deciding that Plaintiff's remaining protected activities were followed by an adverse employment action. Thus, the Court must examine Cole's third element, namely, the causal connectivity between the protected activity and the adverse employment action. The Court finds that there is no causal connectivity sufficient to support Plaintiff's other retaliation claims.

First, Plaintiff's complaint in March 1994 regarding the amount of her salary cannot survive because the next alleged adverse employment action would have been her return from promotional probation in August 1995. Too much time had passed between the alleged protected activity and the return from promotional probation. See, e.g., Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (four-month time lag between protected activity and termination, standing alone, not sufficient to create inference of causation); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (three month time lag insufficient for causal connectivity). The same reasoning applies to Plaintiff's protected activity of filing a charge of discrimination with the EEOC in December of 1995. The next alleged adverse employment action would have been her suspension in July 1997. Again, too much time has passed to support an inference of causal connectivity.

Finally, Plaintiff does not produce evidence of a causal connection between the protected activity of filing a grievance regarding her "demotion" and an adverse employment action. Assuming Plaintiff filed her grievance at the time of her "demotion" in August 1995, the next adverse employment action would have been in July 1997 when she was given notice of a three-week suspension. Once again, too much time has passed to support an inference of a causal connection between the two events.

Because Plaintiff has failed to establish a prima facie case of retaliation, her claim must fail. However, even assuming for the sake of argument that Plaintiff had established a prima facie case, Plaintiff's claims still would fail. As previously explained in this opinion, Defendants had several legitimate nondiscriminatory reasons for these adverse employment actions and Plaintiff has not shown that the proffered reasons were pretextual.

As a result, Defendants' Motion for Sununary Judgment on the issue of retaliation is **GRANTED**. Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

D. HOSTILE WORK ENVIRONMENT

Plaintiff claims that she was subjected to a hostile work environment because Mr. Weimer (1) called her at home inquiring when she was going to come back to work and (2) refused to accept the medical documentation provided to him by Plaintiff's treating physicians. (Pl. Resp. Def. Mot. Summ. J. at 20.)

The nature of a working environment must be due to

a plaintiff's protected characteristic to support a hostile work environment claim. Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994). For example, if Plaintiff asserts a hostile work environment claim based upon race, she must show that "under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus." Trujillo v. University of Col. Health Sciences Ctr., 157 F.3d 1211, 1214 (10th Cir. 1998) (citations omitted). Plaintiff, however, does not explain how any of Mr. Weimer's actions established a hostile work environment because of Plaintiff's protected status. Indeed, Plaintiff does not even articulate on what protected category (i.e. sex, age, race, national origin, etc.) she bases her hostile work environment claim. Moreover, a few phone calls made to the Plaintiff's home does not constitute a severe act of discrimination sufficient to support a hostile work environment claim. Mr. Weimer's calls were not "pervasive or severe enough" to alter the terms of Plaintiff's employment.

Because Plaintiff has not come forward with admissible evidence to support her hostile work environment claim, Defendant's Motion for Summary Judgment on this issue is **GRANTED** and Plaintiff's claim is **DISMISSED WITH PREJUDICE.**

E. COMPENSATION DISCRIMINATION

Plaintiff contends that she should have been paid a salary of approximately $55,000 per year because the Career Service Authority rules authorized compensation up to "Step

K" and the budget allowed a higher salary than Plaintiff was paid. Plaintiff contends that because Defendants paid her successor at a higher rate, she was discriminated against under the Equal Pay Act and Title VII.

To establish a prima facie case under the Equal Pay Act ("EPA"), a plaintiff has the burden of proving that:

> (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the job; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances.

Tidwell v. Fort Howard Corp., 989 F.2d 406, 409 (10th Cir. 1993). Equal work is not to be construed broadly. Nulf v. International Paper Co., 656 F.2d 553, 560-61 (10th Cir. 1981) .

If the plaintiff establishes a prima facie case under the EPA, the burden shifts to the defendant to show that there were legitimate reasons for the wage disparity. These reasons, described in the Equal Pay Act at 29 U.S.C. § 206(d) (1) , are "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential, based on any other factor other than sex." See Tidwell, 989 F.2d at 409.

The Court will assume, for the sake of this order only, that Plaintiff has established a prima facie case of pay

discrimination under the EPA because Plaintiff has produced evidence that she was paid at a lower rate than her successor. Defendants, however, have offered a legitimate reason for the pay differential. Defendants have in place a seniority system or "step" system by which employees are compensated according to the amount of time they are employed in a particular job. New hires or promoted individuals are compensated within the "A" to "C" steps. Transferred individual are paid at their existing salary. Although Plaintiff was compensated at a lower rate than her successor, the Defendant's proffered reason asserts that the wage disparity was not due to discrimination.

Plaintiff must now produce evidence that Defendants' proffered reason is pretextual. This she does not do. Plaintiff offers no evidence that Defendants failed to apply the "step" system or applied it in a discriminatory manner. Plaintiff's successor moved into the directorship from a position different from Plaintiff's position. The two were not similarly situated and, according to the "step" system, would not have been treated in a similar manner. Consequently, Plaintiff's claim under the EPA must fail.

Plaintiff also brings a claim under Title VII for alleged unequal pay. The McDonnell Douglas burden shifting analysis must be applied once again. Assuming that Plaintiff has presented a prima facie case of sex-based wage discrimination under the Title VII analysis, i.e. she is in a protected class and was paid less than a male in a similar position, the burden shifts to Defendants to articulate a non-discriminatory reason for the pay disparity. This they have done. As explained above, Defendants paid Plaintiff according to the established "step" system for promoted individuals. The burden now

shifts to the plaintiff to produce evidence that Defendants' proffered reason is pretextual. Plaintiff, however, fails to offer any evidcnce, aside from conclusory allegations, that Defendants' reason was discriminatory. Plaintiff's Title VII claim for unequal pay must fail.

Defendants' Motion for Summary Judgment on Plaintiff's compensation discrimination claims is **GRANTED** and Plaintiff's claims are **DISMISSED WITH PREJUDICE.**

CONCLUSION

For the reasons provided in this order, Defendants' Motion for Summary Judgment is **GRANTED IN ITS ENTIRETY**. Plaintiff's claims are thus **DISMISSED WITH PREJUDICE**. Each side shall bear its own costs.

Dated this 3rd day of December, 1998

/s/_____
Clarence A. Brimmer
United States District Judge

District Court Order - 12/3/98

Case Number: 97-WY-2657-CB

I certify that a copy of the attached has been (*) hand delivered; (**) placed in respective court pickup-box; or (***) deposited in the United States mails, postage prepaid, addressed to the fbllowing:

Dated: September 7, 1998

JAMES R. MANSPEAKER, CLERK

By: /s/_____
Deputy Clerk

cc: Magistrate Judge Coan

Paul A. Baca
1900 Grant St. #610
Denver, CO 80203

Stevcn W. Moore ***
City Attomey's Office
1445 Cleveland, #303
Denver, CO 80202

Supreme Court, U.S.
FILED
AUG 18 2000
CLERK

(2)

No. 99-2064

IN THE

Supreme Court of the United States

BEATRICE A. ARMENDARIZ,

Petitioner,

v.

THE CITY AND COUNTY OF DENVER,
a municipal corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

J. WALLACE WORTHAM, JR.
City Attorney
STEVEN WOODROW MOORE*
Assistant City Attorney
SYBIL R. KISKEN
Assistant City Attorney
1437 Bannock, Room 353
Denver, CO 80202-5375
(720) 913-3100

* *Counsel of Record*

Counsel for Respondents

161729

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

35pp

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	iii
Statement Of The Case	1
A. Statement Of The Facts	1
B. Proceedings Below	7
Reasons For Denying The Writ	8
A. Petitioner Fails To Cite Any Compelling Reasons That Would Justify The Court Granting Certiorari.	8
B. Petitioner's Claims Based On National Origin, Race, Age, And Sex Were Properly Dismissed.	10
1. The return from promotional probation claim must fail.	11
2. The reassignment of duties claim must fail.	13
3. The "exclusion from loop of information" and "unwarranted criticism" claim must fail.	14
4. The performance review claim must fail.	15

Contents

Page

5. The harassment claim regarding medical documentation must fail. 16

6. The suspension and termination claims must fail. 18

C. Petitioner's Retaliation Claim Was Properly Dismissed. 19

D. Petitioner's Disability Discrimination Claim Was Properly Dismissed. 22

E. Petitioner's Compensation Discrimination Claims Under Title Vii And The Equal Pay Act Were Properly Dismissed. 27

F. The Individual Defenses Asserted By Respondents Wallach And Weimer Bar The Section 1981 Claim. 28

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 23

Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997) 16, 17

Barber v. CSX Distrib. Serv., 68 F.3d 694 (3rd Cir. 1995) 20

Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988) 13

Carrozza v. Howard County, M.D., 847 F. Supp. 365 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) 26

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10, 14

Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526 (10th Cir. 1994) 11

Conner v. Schnuck Markets, Inc., 121 F.3d 1390 (10th Cir. 1997) 21

Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir.1998) 22

Cited Authorities

Page

Duane v. Government Employees Ins. Co., 784 F. Supp. 1209 (D. Md. 1992), *aff'd*, 37 F.3d 1036 (4th Cir. 1994), *cert. dismissed*, 515 U.S. 1101 (1995) 17

Duncan v. AT&T Communications, Inc., 668 F. Supp. 232 (S.D.N.Y. 1987) 17

EEOC v. Flasher, Inc., 986 F.2d 1312 (10th Cir. 1992) 15

Ernst & Ernst v. Hochfelder, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976) 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28

Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976) 20

Ingels v. Thiokol Corp., 42 F.3d 616 (10th Cir. 1994) 11

Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996) ... 24

Little v. United Tech., Career Transicold Div., 103 F.3d 956 (11th Cir. 1997) 20

MacDonald v. Delta Airlines, Inc, 94 F.3d 1437 (10th Cir. 1997) 26

Cited Authorities

Page

Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993) 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10, 11

McKnight v. Kimberly Clark Corp., 149 F.3d 1125 (10th Cir. 1998) 12

Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995) 26

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 9

Nowak v. St. Rita High School, 142 F.3d 999 (7th Cir. 1998) 25

Reeves v. Sanderson Plumbing Prods. Inc., 120 S. Ct. 2097 (2000) 10

Richmond v. ONEOK, Inc., 120 F.3d 205 (10th Cir. 1997) 21

Rodriguez v. Loctite Puerto Rico, Inc., 967 F. Supp. 653 (D. Puerto Rico 1997) 18

Sanchez v. Denver Public Schools, 164 F.3d 527 (10th Cir. 1998) 14

Siegert v. Gilley, 500 U.S. 226, 232 (1991) 28

Cited Authorities

Page

Sorenson v. University of Utah Hosp., 1 F. Supp.2d 1306 (D. Utah 1998), *aff'd*, 194 F.3d 1084 (10th Cir. 1999) 24

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 10

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 10

Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994) 25

University of Tennessee v. Elliot, 478 U.S. 788 (1986) 29

Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992) 25

White v. York Intern. Corp., 45 F.3d 357 (10th Cir. 1995) 23, 25, 26

Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997) 18

Cited Authorities

Page

Statutes:

29 U.S.C. § 255(a) 27

42 U.S.C. § 1981 ..... 7, 8, 11, 17, 19, 28, 29

42 U.S.C. § 1983 7

42 U.S.C. § 12112(d)(4)(B) 17

Rules:

Fed. R. Civ. P. 56(c) 10

United States Supreme Court Rule 10 ..... 1, 8, 29

United States Supreme Court Rule 15(3) 1, 7

United States Supreme Court Rule 24(2) 1, 7

Other Authorities:

29 C.F.R. pt. 1630 app., § 1630.2(j) 24

29 C.F.R. § 1630.2(j)(3)(i) 24, 25

29 C.F.R. § 1630.2(j)(3)(ii) 25

The City and County of Denver, the Office of Employee Assistance, Andrew Wallach, and Christopher Weimer hereby submit this Brief in Opposition to Beatrice A. Armendariz's Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Petitioner has not set forth compelling reasons to support the grant of her petition as required by the Supreme Court Rule 10. In fact, Petitioner makes no argument whatsoever that she has satisfied any of the reasons set forth in Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Statement Of The Facts

Pursuant to Supreme Court Rules 15(3) and 24(2), the Respondents are dissatisfied with the Petitioner's statement of facts because it is incomplete and does not accurately reflect the record presented to the Tenth Circuit. Moreover, Petitioner fails to offer any record citations.

Petitioner commenced her employment with the City and County of Denver ("City") in 1983 as a social worker. Pet. 10th Cir. Apndx. I at 64 and 119-20.[1] She identifies herself as an "Hispanic, Indian, American female" who was born in Kansas City, Missouri. Pet. 10th Cir. Apndx. I at 64, 119-20 and 142. Her date of birth is January 16, 1951. In 1985, Petitioner laterally transferred to the City's newly formed Office of Employee Assistance ("OEA"), which provides counseling services to the City's employees and their families. Pet. 10th Cir. Apndx. I at 64 and 119-20. In early 1994, Petitioner was appointed Acting Director of the OEA and served in that position until March 1995. Pet. 10th Cir. Apndx. I at 64-65.

In late 1994, the City began the process of hiring a permanent Director of the OEA. Pet. 10th Cir. Apndx. I at 65. Petitioner applied and was selected for the position over several

---

1. References to the appendix the Petitioner filed in the Tenth Circuit Court of Appeals will be in the form of "Pet. 10th Cir. Apndx. __."

other applicants, including Respondent Christopher Weimer. Pet. 10th Cir. Apndx. I at 65. Petitioner accepted the offer, to begin on March 2, 1995, and entered into salary negotiations. Petitioner voiced dissatisfaction with the salary being offered. Pet. 10th Cir. Apndx. I at 65-66 and 175. The City hired Petitioner according to the City's Career Service Authority practices for promoted individuals at a Step "A" through "C" pay range. Pet. 10th Cir. Apndx. I at 65-66 and 175. Upon becoming the Director in 1995, Petitioner received a pay increase of more than 16 percent (even though the City's rules provide for only a 9.6 percent increase when an employee is promoted) from $3,114/ month to $3,626/month. Pet. 10th Cir. Apndx. I at 65-66, 175 and 267.

The City has a personnel rule whereby employees who are promoted are placed on "promotional probation" for a period of six months. An employee can be returned from promotional probation at any time to her former position. Pet. 10th Cir. Apndx. I at 186.

During Petitioner's time as director, Respondent Wallach requested from Petitioner an outline of OEA staff duties. Pet. 10th Cir. Apndx. I at 67-68. Petitioner did not respond to the memorandum, claiming she had previously sent to him several memoranda covering the same matters. On July 11, 1995, Respondent Wallach issued another memorandum to Petitioner, criticizing her for, among other things, her repeated failure to provide an outline of staff duties, for her tardiness in providing budget paperwork, and for the "mess" regarding OEA sick leave records. Pet. 10th Cir. Apndx. I at 67-68. While Petitioner inherited disorganized sick leave records from the previous director, she also kept, during the time that she was the director, inadequate records to reconstruct some employees' leave statements. Pet. 10th Cir. Apndx. I at 68-70 and 143. At the time Petitioner was the director, there were also monies missing from the petty cash account. Pet. 10th Cir. Apndx. I at 70 and 143.

On July 14, 1995, Petitioner attended a meeting to discuss an oral complaint made against her that dealt with an alleged breach of confidentiality. Pet. 10th Cir. Apndx. I at 68. After the meeting concluded, Respondent Wallach and Petitioner met alone and Petitioner yelled at Respondent Wallach, accusing him of discriminating against her because she was Hispanic and Native-American. Pet. 10th Cir. Apndx. I at 68, 184-185, 193. In her deposition, Petitioner admitted that she was unprofessional in yelling at Respondent Wallach. Pet. 10th Cir. Apndx. I at 146.

Petitioner filed a grievance on July 25, 1995 regarding the allegations of breach of confidentiality, but her grievance did not allege discrimination. Pet. 10th Cir. Apndx. I at 70 and 147. That grievance was denied. Pet. 10th Cir. Apndx. I at 70. In August 1995, Respondent Wallach made a personnel decision to return Petitioner from promotional probation for the OEA Director position to her former position of social worker. Pet. 10th Cir. Apndx. I at 70-71 and 189.

After Petitioner complained about the return from promotional probation to Respondent Wallach in August 1995, he offered her a "probation within probation." Pet. 10th Cir. Apndx. I at 71 and 148. This would have been an opportunity for Petitioner to have closer and more supervision from Respondent Wallach to perform a very focussed set of tasks, to see if she could implement those tasks successfully as a second chance to succeed in the job. Petitioner, however, rejected the offer. Pet. 10th Cir. Apndx. I at 71 and 148. It also would have paid the same salary as the OEA Director position. Pet. 10th Cir. Apndx. I at 71. In fact, Petitioner testified in her deposition she could have kept her title of OEA Director had she accepted the "probation within probation" offer by Respondent Wallach. Pet. 10th Cir. Apndx. I at 71 and 148. Petitioner rejected the "probation within probation." Pet. 10th Cir. Apndx. I at 71 and 148.

Respondent Weimer, a white male, was appointed from another City job to Director of the OEA on August 21, 1995 at

a higher salary than that of Petitioner. Pet. 10th Cir. Apndx. I at 72-73 and 206-207. Respondent Weimer's date of birth is March 15, 1955. Pet. 10th Cir. Apndx. I at 206. Respondent Weimer is four years younger than Petitioner. Respondent Weimer's appointment to OEA Director was considered a "transfer," not a "promotion." Pet. 10th Cir. Apndx. I at 72-73 and 207. Consequently, he was not subject to the step "A" through "C" pay scale. Respondent Weimer continued to earn the same salary as he had earned previously. Pet. 10th Cir. Apndx. I at 73 and 190. Respondent Weimer became Petitioner's immediate supervisor. Pet. 10th Cir. Apndx. I at 73.

In response to Respondent Weimer's appointment as OEA Director, Petitioner filed a second grievance on August 30, 1995 alleging discrimination based on race, gender and age. The grievance was denied. Pet. 10th Cir. Apndx. I at 73. Petitioner appealed, and after a four day quasi-judicial hearing, the Hearing Officer found that no discrimination or retaliation had occurred. Pet. 10th Cir. Apndx. I at 73-74 and 276-302.

When Petitioner returned to her social worker position, she discovered that some of her former duties had been assigned to other employees. Pet. 10th Cir. Apndx. I at 74 and 207-208. At all times, however, Petitioner was allowed to perform the most essential job duties of a social worker's position. Pet. 10th Cir. Apndx. I at 74 and 207-208. On September 20, 1996, Respondent Weimer completed a performance evaluation for Petitioner and gave her a "meets expectations" rating. Pet. 10th Cir. Apndx. I at 75 and 208.

In March 1997, Petitioner had a motorcycle accident that required surgery on her knee. After Petitioner exhausted her sick leave, she requested and was granted Family Medical Leave from March 10 through June 2, 1997. On May 20, 1997, Petitioner requested additional leave beyond her FMLA entitlement and provided a note from her doctor. Pet. 10th Cir. Apndx. I at 75-76.

The City has a personnel rule allowing supervisors to investigate the alleged illness of an employee absent on sick

leave. The City also has a personnel rule stating that false or fraudulent use of sick leave shall be cause for disciplinary action and may result in dismissal. The City has a personnel rule allowing a supervisor to require the employee to provide a statement signed by an attending physician satisfactory to the supervisor. Pet. 10th Cir. Apndx. I at 75 and 303.

Petitioner was advised by Respondent Weimer more than once to have her doctor complete a "Physician Certification of Employee/Patient Absence" form to document what restrictions her doctor had imposed upon her that prevented her from performing her job duties. Pet. 10th Cir. Apndx. I at 76-79 and 20-211. However, Petitioner's doctor never properly completed the form to Respondent Weimer's satisfaction. Pet. 10th Cir. Apndx. I at 76-79. Petitioner never provided a medical explanation as to why she, whose position was primarily a sedentary one, could not perform the tasks that required little, if any, physical movement. Pet. 10th Cir. Apndx. I at 76-79. Indeed, Petitioner ultimately admitted in her deposition that her knee injury did not, in and of itself, prohibit her from performing her job duties as a social worker. Pet. 10th Cir. Apndx. I at 157.

On July 9, 1997, Petitioner was informed that she was responsible for assuring that her doctor properly complete and return the form by July 11. Pet. 10th Cir. Apndx. I at 78. Respondent Weimer did not receive the form; so on Friday, July 18, he told Petitioner to report to work the following Monday. Pet. 10th Cir. Apndx. I at 79 and 158. She did not report to work but called in sick. Pet. 10th Cir. Apndx. I at 79 and 158.

On August 1, 1997, Respondent Weimer conducted a pre-disciplinary meeting based upon Petitioner's approximately five weeks of unauthorized leave. Pet. 10th Cir. Apndx. I at 79-80 and 158. Petitioner appeared at the pre-disciplinary meeting without any crutches or other devices to assist with her alleged knee condition. Pet. 10th Cir. Apndx. I at 79-80 and 158. At the pre-disciplinary meeting, Petitioner never offered any explanation as to what about her knee condition prevented her

from performing her duties as a clinical social worker, including sitting at a desk, talking on the telephone, meeting with clients and preparing paperwork, for the approximately five weeks that she took unauthorized leave. Pet. 10th Cir. Apndx. I at 80 and 212. As a result of the unauthorized leave, a three-week suspension without pay was imposed on Petitioner, from August 25 through September 12, 1997. Pet. 10th Cir. Apndx. I at 80, 212, and 248-251. At the meeting, Petitioner claimed for the first time that psychological, rather than physical, limitations prevented her from returning to work. Pet. 10th Cir. Apndx. I at 80 and 213. She was thus placed on administrative leave (with pay) on August 4, 1997 and sent for a fitness-for-duty evaluation by Dr. Gary Gutterman. Pet. 10th Cir. Apndx. I at 80, 159 and 213. Dr. Gutterman opined that Petitioner was capable of returning to full-duty work immediately and that her condition did not substantially limit any major life activities. Pet. 10th Cir. Apndx. I at 80-81, 159 and 213.

Petitioner eventually returned to work, but was frequently absent. She left at 10:45 a.m. on August 18 and never returned that day. Pet. 10th Cir. Apndx. I at 82 and 214. On August 19, she reported to work, but instructed that she was not seeing clients or accepting client telephone calls. Pet. 10th Cir. Apndx. I at 82, 165 and 214. On August 20, Sharon Trujillo, another City employee, complained in writing that she had encountered rudeness and abruptness when she called the OEA and Petitioner answered the phone. Pet. 10th Cir. Apndx. I at 82, 214 and 258. Also, on August 20, when Respondent Weimer attempted to meet with Petitioner to discuss her work since she returned to the OEA, she did not answer Respondent Weimer's questions and ultimately stood up and indicated that she had to leave for a doctor's appointment. Pet. 10th Cir. Apndx. I at 82, 167 and 214. She also indicated that she would not be returning to the office later in the day, even though her appointment was scheduled to last just one hour. Pet. 10th Cir. Apndx. I at 82, 167 and 214.

Another pre-disciplinary meeting was held on August 27, after which Respondent Weimer made the decision to terminate Petitioner. Pet. 10th Cir. Apndx. I at 83 and 214. As a result of inappropriate behavior, Petitioner was found to have violated at least eight work rules. Pet. 10th Cir. Apndx. I at 83, 215-216 and 263-266.

Petitioner was the first OEA social worker to have missed so much time from work. Pet. 10th Cir. Apndx. I at 85 and 167. After Respondent Weimer dismissed Petitioner, he hired another woman, Sue Carizzales, to fill Petitioner's vacated social worker position. Pet. 10th Cir. Apndx. I at 85 and 215. Petitioner subsequently filed another appeal with the Hearing Office of the Denver Career Service Authority. Pet. 10th Cir. Apndx. I at 85-86. Petitioner alleged discrimination and retaliation. Pet. 10th Cir. Apndx. I at 85-86. Petitioner did not attend the hearing because her mother was having knee surgery. Pet. 10th Cir. Apndx. I at 85-86. Because Petitioner did not appear, her claims were dismissed with prejudice by the Hearing Officer who found Petitioner's failure to appear unwarranted because of the minor nature of the relative's knee surgery. Pet. 10th Cir. Apndx. I at 85-86. Petitioner subsequently commenced the instant action alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), §§ 1981 and 1983, and the Equal Pay Act. (EPA).

B. Proceedings Below

Pursuant to Supreme Court Rules 15(3) and 24(2), the Respondents are dissatisfied with the Petitioner's summary of the proceedings below. In particular, Petitioner has failed to point out that she limited the scope of her appeal to the Tenth Circuit when she asserted that the sole issue was "whether in granting summary judgment for the defendants the district court erred in holding that [petitioner] failed to make a sufficient showing that the defendants' articulated nondiscriminatory reasons for their adverse employment actions were, in fact, not their true reasons and were, indeed, pretextual." Pet. 4a-5a.

The Tenth Circuit also found that Petitioner waived issues that she raised for the first time in oral argument and other issues that were not adequately briefed. Pet. 5a. Thus, the Tenth Circuit considered on appeal only those claims that were dismissed by the District Court on the issue of pretext. Consequently, Petitioner has waived her right to seek certiorari review for those claims that were dismissed on other grounds, most notably that she failed to establish a prima facie case for certain claims on summary judgment. The claims include those premised upon the "exclusion from the information loop," "unwarranted criticism," performance reviews, a suspension, the "handling of disability insurance claims," disability discrimination under the ADA, retaliation, and a hostile work environment. In this proceeding, Petitioner also has abandoned her "handling of disability insurance" claims and hostile work environment claims as she does not address them in her petition.

REASONS FOR DENYING THE WRIT

A. PETITIONER FAILS TO CITE ANY COMPELLING REASONS THAT WOULD JUSTIFY THE COURT GRANTING CERTIORARI.

Petitioner's lawsuit alleges claims against the City and County of Denver under the Equal Pay Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act of 1990 ("ADA"). Her lawsuit also includes claims against Respondents Wallach and Weimer in their individual capacities under 42 U.S.C. § 1981, for race discrimination and retaliation. Despite her shotgun approach in pleading claims, no admissible evidence surfaced in the summary judgment briefing that supported any of her claims. Petitioner did not present any issue of material fact on the essential elements of her claims, and summary judgment was properly affirmed by the Tenth Circuit. In her petition, Petitioner makes no meaningful argument as to why the Tenth Circuit should be reversed, let alone why this Court should grant her petition under Supreme Court Rule 10.

The Petitioner has not raised any compelling reasons that would justify the grant of certiorari. The Petitioner has not presented any issue involving a conflict among circuits. Nor has the Petitioner cited any unsettled questions of federal law or conflict with Supreme Court precedent. Instead, the Petitioner raises new issues that were not considered by the Tenth Circuit or inconsequential issues involving an interpretation of facts presented in the record reviewed in granting the Respondents' motion for summary judgment.

As stated above, the Tenth Circuit found that the Petitioner limited the scope of her appeal and waived issues that she raised for the first time in oral argument and through inadequate briefing. In particular, Plaintiff has waived all arguments regarding the determination that she failed to satisfy each element in support of the *prima facie* case for certain discrimination claims. Under these circumstances, the Supreme Court should not grant certiorari for review of issues that were not raised in the Tenth Circuit proceedings. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13, *reh'g denied*, 425 U.S. 986 (1976). Petitioner does not make any argument that she did not limit or otherwise waive issues for consideration by the Tenth Circuit.

As to the issues that were not limited or otherwise waived, certiorari is still not appropriate for the additional reason that the petition is primarily a challenge regarding the lower courts' interpretation of the facts presented in the record supporting the grant of summary judgment. The Supreme Court, however, ordinarily does not grant certiorari regarding a conflict regarding the interpretation of facts. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.")

The only issue considered by the Tenth Circuit was whether summary judgment was appropriate when the petitioner was

unable to establish pretext as required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097 (2000).[2] The Tenth Circuit correctly followed Supreme Court precedent regarding analysis of "pretext" in discrimination claims. In short, the Tenth Circuit correctly applied the law consistent with precedent from the Supreme Court, and there is no compelling reason that would warrant the petition for certiorari being granted. Because of the "melting pot" method of pleading claims presented in Petitioner's complaint, the Respondents will address each claim individually on the issue of pretext. Also, because the Petitioner raises issues in the petition that were limited or otherwise waived at the Tenth Circuit level, Respondents feel compelled to address those previously abandoned or waived issues as well.

B. PETITIONER'S CLAIMS BASED ON NATIONAL ORIGIN, RACE, AGE, AND SEX WERE PROPERLY DISMISSED.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party need not affirmatively negate the nonmovant's claim in order to obtain summary judgment. *Celotex*, 477 U.S. at 322-23. Instead, the movant only bears the initial burden of " 'showing'— that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. In this case, the Tenth Circuit found that Petitioner was unable to come forward with admissible facts to demonstrate that the Respondents' legitimate, nondiscriminatory reasons were pretextual.

---

2. The Tenth Circuit's decision in the instant action is consistent with *Reeves* even though *Reeves* was decided after the Tenth Circuit decision.

The burden-shifting framework set forth in *McDonnell Douglas* applies to her claims based on seven alleged "adverse actions" under Title VII for race (Native American), national origin (Hispanic), and sex discrimination, § 1981 for race discrimination, and the ADEA for age discrimination. *McDonnell Douglas* requires that Petitioner demonstrate the *prima facie* elements of her claim. The Respondents must then show legitimate, non-discriminatory reasons for their action, at which time Petitioner then has the burden to produce "evidence upon which a fact finder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decision[ ] are pretextual." *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994). "Failure to come forward with evidence of pretext will entitle the defendant to judgment." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 529 (10th Cir. 1994). Each of the alleged "adverse actions" is addressed in turn below:

1. The return from promotional probation claim must fail.

The Tenth Circuit correctly found that the Petitioner failed to show that the legitimate, nondiscriminatory reasons profferred by the Respondents were a pretext for discrimination. There are several legitimate, nondiscriminatory reasons as to why Petitioner was returned from promotional probation: she was late or altogether failed in providing budget documents and job descriptions to Respondent Wallach; she attempted to pay a temporary worker $25 an hour although the position was a clerical position and Wallach had previously advised her to hire somebody at $10 to $11 hour for the clerical position; she attempted to have Foote supervise her rather than Respondent Wallach; she failed to ensure that leave accrual and leave deductions were properly recorded for OEA employees; and her failure to manage the petty cash account reflected poorly on her skills to manage the OEA.

In her summary judgment response, Petitioner did not rebut that she failed to maintain adequate leave records for leave time

used and accrued during the time that she was the OEA director; her argument that she inherited deficient leave records does excuse her from her own performance deficiencies in not maintaining adequate records for the time period she held the directorship. She also admitted that she was late with producing budget records.

Petitioner failed to establish that the City's legitimate, nondiscriminatory reasons are a pretext. The test here is good faith, meaning whether Respondent Wallach sincerely believed in the reasons supporting his decision to return Petitioner from promotional probation. In *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125 (10th Cir. 1998), the Tenth Circuit dismissed an ADEA case on the question of pretext where an employee had "not shown that at the time of his termination there was any dispute or a genuine issue concerning the *sincerity* of defendants' proffered reason for his termination." (Emphasis Added.) In *McKnight*, the employer proffered the legitimate, nondiscriminatory reason that it believed in good faith that the employee had sexually assaulted a female security guard, and the employee could not show that the belief was insincere. The Tenth Circuit also explained, "an articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment. *The test is good faith belief.*" (Emphasis Added.) 149 F.3d at 1129.

Petitioner cannot establish that Respondent Wallach did not in good faith believe that she was late in her tendering budget documents when she openly admits that she was late. Nor can she assert that Respondent Wallach did not sincerely believe that she attempted to hire a clerical worker at $25 an hour when she openly admits that she "took action" to hire a clerical worker without Respondent Wallach's approval, and the contract for hiring the temporary clerical worker stated the worker would be paid $25 an hour, even though it later turned out to be, according to her story, a typographical error. Nor can Petitioner assert that Respondent Wallach did not sincerely believe that

she had deficient leave records for the time period she supervised the OEA when an audit showed that her leave records were deficient or non-existent for the time period that she was the OEA Director. Respondent Wallach sincerely believed in the legitimate, nondiscriminatory reasons justifying her return from promotional probation. Petitioner presented no evidence to the contrary. An employee's "mere conjecture that [her] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). Petitioner's conclusory statements or unsupported assertions are inadequate to overcome summary judgment. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1417-18 (10th Cir. 1993).

2. The reassignment of duties claim must fail.

The Tenth Circuit properly determined that Petitioner did not establish that the Respondent's legitimate, nondiscriminatory reasons for the reassignment of duties were a pretext. Respondent Weimer exercised his business judgment in assigning particular job duties in the department. Schefe was assigned the task of working with drug and alcohol-related issues because Respondent Weimer wanted just one person to handle this area within the office, and chose Schefe who holds a Master's Degree in Social Work and has experience in the field of drug and alcohol counseling. Respondent Weimer assigned the job duties pertaining to workplace violence to himself because he wanted to send a message to other city departments that the OEA takes workplace violence issues so seriously that its director personally handles the training in that area.

Even if Petitioner were the best-qualified person with respect to these tasks, as she asserts, the failure to assign them to her is not, *a fortiori*, evidence of pretext. An employer cannot assign *all tasks* to the one employee in the office who thinks he or she is the most qualified. No work would ever be performed by the remainder of the employees if that were true.

3. The "exclusion from loop of information" and "unwarranted criticism" claim must fail.

The district court concluded that "exclusion from the loop of information" and "unwarranted criticism," even if true, did not rise to the level of adverse employment actions. Thus, the district court concluded that Petitioner failed to satisfy the elements for the *prima facie* case. Because the Petitioner waived before the Tenth Circuit her arguments regarding the "prima facie" issues in this case, the Supreme Court should not consider these claims.

In any event, the district court properly determined that "exclusion from the loop" and "unwarranted criticism" are not adverse employment actions. *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532-33 (10th Cir. 1998) (" 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' such as those alleged here are not included within the definition of adverse action absent evidence that they had some impact on the employee's employment status"). Petitioner failed to rebut this argument with admissible evidence as required under *Celotex*, 477 U.S. at 317. Moreover, Petitioner failed to provide any evidence relating to a specific instance where she was not advised about something she should have been advised about and where others outside the protected group(s) were not excluded from the loop of information. Thus, whether information was provided to her or not is immaterial unless it can be shown that the dissemination of information was done on a discriminatory basis in favor of employees outside of the protected group. Her argument that Respondent Weimer did not have weekly staff meetings undermines a disparate treatment claim because she, in essence, is admitting that the alleged lack of communication was directed to all employees.

With respect to the criticism lodged by Respondent Weimer, he had a legitimate, nondiscriminatory reason — he believed Petitioner was attempting to thwart him as supervisor in providing an unsolicited opinion with respect to a clinical issue. However, whether the criticism is justified or not is immaterial.

"Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute." *EEOC v. Flasher, Inc.*, 986 F.2d 1312, 1321 (10th Cir. 1992). Petitioner did not establish that Respondent Weimer did not sincerely believe that Petitioner was attempting to thwart him by providing an unsolicited opinion of great magnitude, nor did she contest that her unsolicited opinion was of a great magnitude. Thus, Petitioner failed to carry her burden in establishing pretext.

4. The performance review claim must fail.

The district court concluded that Petitioner failed to offer evidence satisfying the *prima facie* elements of this claim. The Supreme Court should not grant certiorari review on this issue because the Tenth Circuit did not address this issue as a result of Petitioner's waiver of issues — limiting the scope of the Tenth Circuit appeal to issues involving only pretext.

In an abundance of caution, the Respondents offer the following argument should the Supreme Court wish to consider the performance review claims. The district court concluded that a "meets expectations" rating on her 1996 performance review was not an adverse action. The district court further concluded that she had not demonstrated that "glowing appraisals were given to younger, non-minority, or male employees who performed comparable work."

It is absurd for Petitioner to contend that this rating was somehow discriminatory. She apparently believes that she should have been rated higher in her performance of social work duties. Respondent Weimer was solely responsible for rating Petitioner in this performance review, and determined from his observations during this time period, that her performance was average, and thus he provided to her a "meets expectations" rating. She offered no evidence that comparable employees outside the protected group(s) received higher ratings for the same level of performance displayed by Petitioner. Although she argued that her prior performance reviews had higher ratings, that fact is immaterial, because the "similarly situated" analysis

is directed to employees of the same supervisor. According to the Tenth Circuit, "[s]imilarly situated employees are those who with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997). The September 20, 1996 performance review was the first one that Respondent Weimer performed for Petitioner. Moreover, prior performance reviews do not, by themselves, establish that a later performance review is a pretext for discrimination.

In any event, Petitioner failed to show that the City's legitimate, nondiscriminatory reason is a pretext. There is no evidence in the record that Respondent Weimer did not consider comments made about Petitioner from officials outside the OEA. He rated her performance according to his observations.

With respect to Petitioner's final performance review, she cannot allege that she was performing at a satisfactory level as she was absent from work so many days during this rating period (excluding the time she was on Family and Medical Leave). She did not establish that non-minority similarly situated employees were rated higher than she even though they had the same level of performance; she could not do this as she is the only clinical social worker to have missed so much work without adequate medical documentation. Nor did Petitioner show that the City's legitimate, nondiscriminatory reasons for the final review were a pretext. Finally, the City incorporates the arguments contained *infra* relating to medical documentation, suspension, and dismissal, which concern this rating period, and which demonstrate that Petitioner was not performing at a satisfactory level.

5. The harassment claim regarding medical documentation must fail.

The Tenth Circuit appropriately found that the Petitioner failed to establish that the proffered legitimate, nondiscriminatory reasons for requesting medical documentation were a pretext. Respondent Weimer was following the City's personnel rules which allow a supervisor

to investigate alleged illnesses and require adequate documentation attesting to an employee's inability to work. Petitioner offered no evidence of pretext.

Petitioner's argument is that Weimer was "being totally inflexible" because he did not contact her doctors directly and because one of the doctors called the form requesting additional information "ridiculous." It is unclear what sort of legal argument this is, but in any event, the "ridiculousness" of Respondent Weimer's actions is belied by the fact that Petitioner ultimately admitted in her deposition that there was *nothing* about her knee injury that prevented her from returning to her job, which was primarily a desk job. This is precisely what Respondent Weimer was seeking to determine from his requests for medical documentation, consistent with the City's personnel rules.

Moreover, notwithstanding Petitioner's displeasure with Respondent Weimer's repeated requests for information, such do not give rise to a claim of harassment under Title VII, § 1981, or the ADEA. Such statutes involve only race, national origin, sex, or age discrimination, not any alleged handicap or disability discrimination. *Aramburu*, 112 F.3d at 1411. *See also Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1216 (D. Md. 1992) (noting § 1981 does not address handicap discrimination), *aff'd*, 37 F.3d 1036 (4th Cir. 1994), *cert. dismissed*, 515 U.S. 1101 (1995); *Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 235 (S.D.N.Y. 1987) (ruling that § 1981 does not address disability discrimination).

Petitioner leaves the Court and the Respondents guessing as she does not explain with respect to what protected status Respondent Weimer allegedly was harassing her. Indeed, if it is with respect to her alleged disabled status, the Americans With Disabilities Act allows an employer to request adequate medical documentation from an employee who requests leave, and to even order a physical examination with a physician of the employer's choosing. 42 U.S.C. § 12112(d)(4)(B) ("a covered entity may make inquiries into the ability of an employee to

perform job-related functions); *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653 (D. Puerto Rico 1997).

Respondent Weimer had a legitimate, non-discriminatory reason for requesting additional medical documentation from Petitioner, given her extensive absence from work, when her purported reason for not returning to work was a knee injury, her job primarily was a desk job, and she never once explained why she could not return to work notwithstanding the knee injury. In response to her argument that Respondent Weimer should have contacted her physician by telephone, instead of the letter format chosen by Respondent Weimer, Petitioner cites no case law for this proposition, and does not explain how the communication by telephone would in any event be different than that by correspondence. Moreover, her physician's purported opinion that the correspondence from Respondent Weimer constituted "ridiculous forms" is not admissible evidence on summary judgment. It is an inadmissible opinion.

6. The suspension and termination claims must fail.

The Petitioner should not be allowed to challenge the suspension claim because the district court found that she failed to establish the *prima facie* case, and Petitioner was found to have waived this issue for appeal by the Tenth Circuit. In any event, Petitioner cannot establish this *prima facie* burden because she was unable to compare herself to similarly situated non-minority employees who had missed so much work and failed to provide adequate medical certifications for such long absences.

Even if Petitioner could establish the *prima facie* elements her suspension claim, there were legitimate, non-discriminatory reasons for the suspension which she does not refute or provide any evidence of pretext: she had unauthorized leave and refused to report to work. *See, e.g., Willis v. Conopco, Inc.*, 108 F.3d 282, 287 (11th Cir. 1997) ("[w]hen an employee refuses to show up for work after being informed that her failure to do so will result in the loss of her job, the employer has presented a valid, non-retaliatory reason for terminating the employee").

With respect to the termination, Petitioner concedes any gender discrimination claim because she was replaced with a female, but continues to advance this claim on the theory of discrimination based upon national origin, race, and age (notwithstanding the fact that she failed to produce evidence of her replacement's national origin, race, or age). The Tenth Circuit properly affirmed summary judgment on this claim because the Petitioner did not come forward with admissible evidence establishing that the legitimate, nondiscriminatory reasons were a pretext for discrimination. It is undisputed that Petitioner failed to produce adequate documentation requested by Respondent Weimer to substantiate Petitioner's request for further leave from work. It is also undisputed that Dr. Gary Gutterman, M.D., a psychiatrist, evaluated Petitioner, and determined she was fit to return to work immediately, and Petitioner was refusing to do so notwithstanding Dr. Gutterman's determination. Trujillo, a City employee, made a written complaint regarding her encountering rudeness and unprofessionalism from Petitioner when she telephoned the OEA. Petitioner was also hostile and belligerent toward Respondent Weimer in the final days of her employment. In her petition, Petitioner fails to address the Respondents' arguments regarding her rudeness and belligerence.

C. PETITIONER'S RETALIATION CLAIM WAS PROPERLY DISMISSED.

The Supreme Court should not grant certiorari review on the retaliation claim because the Tenth Circuit affirmed summary judgment of this claim on the issue of pretext and the Petitioner failed to address this pretext issue in her petition. Petitioner offers arguments regarding the *prima facie* burden, but as expressed above, those issues were waived by Petitioner before the Tenth Circuit with her limiting the scope of her appeal and inadequate briefing. In any event, Petitioner cannot satisfy the *prima facie* and pretext requirements for this claim.

The district court assumed Petitioner's retaliation claim was brought under Title VII, the ADEA, § 1981, and the ADA, based

on three purported protected activities: (1) filing grievances regarding breach of confidentiality allegations brought against her, her return from promotional probation and her termination; (2) complaining in March of 1994 that if she were a white male, she would be paid more money; and (3) the filing of a charge with the EEOC and the Colorado Civil Rights Commission in December 1995. The district court ultimately concluded that one of the grievances (regarding breach of confidentiality) was not a protected activity, one of the grievances (regarding the dismissal) was not followed with any adverse action, and the remaining grievance, complaint, and EEOC charge, were not close enough in time to any adverse action to support a retaliation claim.

With respect to the grievance regarding the breach of confidentiality, Petitioner did not allege discrimination and therefore it was not a protected activity. *Barber v. CSX Distrib. Serv.*, 68 F.3d 694 (3rd Cir. 1995) (complaints about unfair treatment in general not found to be complaint of discrimination). However, she claims she verbalized her complaint of discrimination to Respondent Wallach before filing the written grievance. Notwithstanding that she did not allege her verbal complaint to Respondent Wallach as a protected activity, she admits she unprofessionally yelled at Respondent Wallach in the conversation on July 14, 1995, to which she refers. Because Petitioner was so confrontational and hostile in yelling at Respondent Wallach that he discriminated against her, such communication is precluded from being viewed as a protected activity. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (plaintiff's extreme hostility in complaining of discrimination not found to be protected activity under Title VII). It was also not objectively reasonable for Petitioner to believe she was being discriminated against. *Little v. United Tech., Career Transicold Div.*, 103 F.3d 956 (11th Cir. 1997) ("A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices,

but also that his belief was *objectively* reasonable in light of the facts and record presented"). In fact, Petitioner states she felt discriminated against because the Mayor donated sick leave to a black employee, and Petitioner was asked to process the donated sick leave as quickly as possible. These facts, measured under an objective test, would not lead a non-black employee to reasonably conclude in good faith that he or she was a victim of race discrimination. Courts do not afford protected activity status where an employee does not have a good faith, articulable basis upon which to complain of discrimination.

With respect to the grievance regarding her return from promotional probation, Petitioner does not specify when this grievance was filed, but assuming it was at the time she was returned from promotional probation in August 1995, the next adverse employment action would have been in July 1997 when she was given notice of a three-week suspension. This is almost two years later. Under these circumstances, there is no causal connection as too much time passed between the alleged protected activity and the notice of suspension. *See Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997) (four-month time lag between participation in protected activity and termination not sufficient to justify inference of causation); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (finding three months insufficient).

With respect to the complaint about an alleged disparity in pay in March of 1994, even if true, which the City strongly contests, Petitioner cannot establish a causal connection to any adverse employment action. Petitioner states that the first adverse employment action was her extension of promotional probation on July 19, 1995. An extension of promotional probation is not an adverse employment action. In any event, too much time elapsed from the alleged protected activity and the probation extension for there to be an inference of a causal connection.

Finally, with respect to the charge of discrimination filed in December of 1995, there is no evidence in the record that

Respondent Weimer knew at that time that the charge was filed. To the contrary, he was not aware of it. While it is true that the filing of a charge of discrimination with the EEOC is viewed as a protected activity, there is no causal connection if the alleged perpetrator committing retaliation does not even know of the EEOC charge being filed.[3] *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir.1998). Moreover, assuming the EEOC charge was filed on December 7, 1995, the next adverse employment action would be the notice of suspension in July 1997. Again, this is almost 1 ½ years later. Under these circumstances, there is no causal connection.

Moreover, there are legitimate, non-retaliatory reasons for each and every adverse action Petitioner contends is retaliatory. The Respondents incorporates by reference preceding arguments regarding the legitimate nondiscriminatory reasons. As stated before, there is no evidence in the record that the explanations for the adverse employment actions are a pretext.

D. PETITIONER'S DISABILITY DISCRIMINATION CLAIM WAS PROPERLY DISMISSED.

The Supreme Court should not grant certiorari review of the disability discrimination claim because it was dismissed by the district court for her failure to satisfy the *prima facie* case and because she limited the scope of her appeal and waived that issue in the proceedings before the Tenth Circuit. Moreover, Petitioner's arguments are meritless.

The district court concluded that Petitioner did not establish a *prima facie* case of disability discrimination because she did not establish that she is disabled as she offered no affidavits from medical experts indicating that her alleged depression substantially limited any major life activities and the physician

---

3. Petitioner makes much ado about Weimer having approved time off for Petitioner and her witnesses to attend a Career Service hearing. However, that does not establish that Weimer knew what the hearing was about. Petitioner's conjecture and speculation were not sufficient to defeat summary judgment.

statements she offered regarding depression and situational anxiety disorder constitute inadmissible hearsay. The district court further concluded that she produced no evidence that she was terminated because of her alleged disability. To the contrary, the court noted that the City believed, based on the affidavit of Dr. Gutterman, who indicated that Petitioner was fit for duty, was not disabled. Petitioner argues that she was disabled pursuant to the inadmissible hearsay statements from her physicians, and that she had discussed the possibility of a transfer as a reasonable accommodation with Dr. Gutterman.

Petitioner has offered no meaningful argument to refute the district court's conclusion. With respect to the first element of an ADA claim under *White v. York Intern. Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995), that an employee is disabled, approximately one month before her termination for employment, Petitioner was examined by Dr. Gary Gutterman, M.D., a psychiatrist, who diagnosed Petitioner with a mild depression. Dr. Gutterman also opined that, at the time of his examination of Petitioner, she did not have a physical or mental impairment substantially limiting one or more major life activities. In fact, he said that she was fit to return to work immediately at that time without any restrictions.

Petitioner's allegations of depression and situational anxiety disorder did not defeat summary judgment for several reasons.[4] First, the ADA requires an individualized inquiry, and there cannot be any automatic determinations that a certain mental condition, including depression or situational anxiety disorder, qualifies as a disability within the meaning of the ADA. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Indeed, "just because the plaintiff has been diagnosed with an impairment it does not follow that she is disabled under the

4. It should also be noted that Petitioner claims that she was totally disabled as of August 1, 1997. Pet. 10th Cir. App. I at 130-34. If Petitioner's allegation is taken as true, then she is not a qualified individual with a disability because she cannot perform any job whatsoever. Petitioner is speaking out both sides of her mouth.

ADA. She must still prove that she is substantially limited in her major life activities." *Sorenson v. University of Utah Hosp.*, 1 F. Supp.2d 1306, 1309 (D. Utah 1998), *aff'd*, 194 F.3d 1084 (10th Cir. 1999). *See also*, 29 C.F.R. pt. 1630 app., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual").

Moreover, as Petitioner did not produce affidavits from any experts on the issue whether she has a physical or mental impairment substantially limiting one or major life activities, and because her alleged disability is not so obvious, she cannot rely on her own testimony to establish she has a disability within the meaning of the ADA. Expert testimony is generally required for an ADA litigant to prove his or her prima facie case unless the disability is patently obvious. While there may be rare circumstances where the disability is obvious (*e.g.*. the loss of an arm), such is not case here. *Katz v. City Metal Co.*, 87 F.3d 26, 31 n.4 (1st Cir. 1996) ("[Where it is not obvious to a lay jury that the condition affects one of the bodily systems listed in the regulations, expert testimony that it does may well be necessary to avoid judgment as a matter of law"). Because Petitioner's alleged disability is not obvious, and Petitioner did not disclose any medical experts, she could not prove this critical element of her ADA claim.

The statements made by Petitioner's treating physicians to Respondent Weimer are hearsay, and thus not admissible for proving the truth of the matter asserted. Moreover, such statements did not address the issue whether she has a physical or mental impairment substantially limiting on or more major life activities.

Even assuming *arguendo* that Petitioner's mental condition limited her ability to work, that does not mean that her major life activity of working had been substantially limited. Her inability to work one job does not mean that her major life activity of working has been substantially limited. 29 C.F.R.

§ 1630.2(j)(3)(i). Petitioner apparently is misusing this term. With respect to the major life activity of working, the term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Specific factors to be taken into consideration in this analysis are set forth in 29 C.F.R. § 1630.2(j)(3)(ii).

Petitioner offered no evidence in support of any of these mandatory factors. Thus, she had not established that her major life activity of working has been substantially limited. Moreover, Petitioner admits that she has never consulted or obtained any reports from any vocational expert to address these factors. The Tenth Circuit affirmed summary judgment where an employee suing for disability discrimination failed to present vocational expert testimony to establish that the employee's medical condition substantially limited her major life activity of working. *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992).

Nor did Petitioner prove the second element of the ADA prima facie case, that is, show that she is a qualified individual with a disability. This involves a two-part analysis: (1) first, whether the individual could perform the essential functions of the job, *i.e.*, functions that bear more than a marginal relationship to the job at issue; and (2) second, if it is concluded that the individual is not able to perform the essential functions of the job, there must be a determination whether any reasonable accommodation by the employer would enable the employee to perform those functions. *White*, 45 F.3d at 361-62. Petitioner is not "qualified" as she refused to come to work. "Obviously, an employee who does not come to work cannot perform the essential functions of [her] job." *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998), citing *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994).

With respect to the issue of reassignment, Petitioner did not allege in her complaint that she should have been reassigned to another position on a temporary basis, or that she has been denied any reasonable accommodation. To the extent that Petitioner now alleges she should have been reassigned to another position, she does not cite one vacant position that she *could* have been reassigned to. She therefore cannot show that reassignment was even possible as a reasonable accommodation; she cannot sit back and rely on her opinions, speculation, and cursory statements in an attempt to avoid summary judgment. *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995) (plaintiff's speculation that he probably could have transferred to another job without identifying a specific position was insufficient to survive summary judgment); *White*, 45 F.3d at 357 (employee's conclusory allegations that the employer could accommodate him were insufficient to survive summary judgment); *Carrozza v. Howard County, M.D.*, 847 F. Supp. 365, 368 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) (summary judgment granted because the plaintiff's claim that she could perform the job with reasonable accommodation amounted to "conclusory observations" and "personal conjecturing"). Respondent Weimer said in his affidavit that there were no positions available, and Petitioner failed to rebut this fact.

Petitioner could not prove the third element of the *prima facie* case under *White*, that the employer terminated the employee because of his or her disability. If the employee cannot show, to satisfy the third element, that he or she was terminated as a result of a disability, then summary judgment is proper. *MacDonald v. Delta Airlines, Inc*, 94 F.3d 1437, 1446 (10th Cir. 1997). There is no evidence in the record that Petitioner was terminated as a result of a disability. To the contrary, Petitioner was terminated because she failed to come to work and failed to provide adequate medical certifications justifying the same. The City believed Petitioner was capable of working without restrictions, and thus it cannot be said that

the City dismissed Petitioner because of a disability. The City also incorporates by reference prior discussions of its legitimate, nondiscriminatory reasons for Petitioner's dismissal.

E. PETITIONER'S COMPENSATION DISCRIMINATION CLAIMS UNDER TITLE VII AND THE EQUAL PAY ACT WERE PROPERLY DISMISSED.

The Tenth Circuit properly affirmed summary judgment of the compensation claims.

The City had a legitimate reason pursuant to the City's personnel rules for Respondent Weimer being paid more than Petitioner: Petitioner obtained the Director's position as a promotion and as such was to be compensated within the "A" to "C" step range; Respondent Weimer transferred into the position and his salary remained the same as it had been before. The court found that Petitioner had produced no evidence of pretext.

Petitioner argues that $55,000 was budgeted for the Director's position and therefore she should have received such amount. Moreover, she argues that Respondent Weimer was not qualified for the position. Petitioner's arguments are without merit and should be summarily rejected. Moreover, the fact that Respondent Weimer received a higher salary is also irrelevant to the analysis as he was not similarly situated to Respondent. He transferred into the position as a director from a different agency, and kept his same salary. Petitioner's contention that Respondent Weimer was less qualified than she is nothing but inadmissible opinion testimony. Petitioner has not explained how this is so, and her argument is contrary to the undisputed fact that Respondent Weimer, unlike Petitioner, was already a director when he transferred to the OEA as its director.

Further, Petitioner's EPA claim is time-barred. The statute of limitations for EPA claims is two years. 29 U.S.C. § 255(a). Petitioner's position as OEA director ended in August 1995. Her complaint was filed December 19, 1997, more than two years later. Petitioner did not establish a willful violation (which

has a three-year statute of limitations) because it is undisputed that it is the City's practice to pay new hires or individuals being promoted between the "A" and "C" steps, and that Respondent Weimer was paid more because he kept his directorship salary when he transferred to the OEA.

F. THE INDIVIDUAL DEFENSES ASSERTED BY RESPONDENTS WALLACH AND WEIMER BAR THE SECTION 1981 CLAIM.

Although not considered by the Tenth Circuit and the district court, individual defenses asserted by Respondents Wallach and Weimer were addressed by the Petitioner in her petition for writ of certiorari. Should the Court wish to address these issues, the Respondents submit the following argument for each individual defense.

The parties agree that in Colorado the statute of limitations for this claim is two years, that the continuing violation doctrine does not apply, and that all conduct prior to December 19, 1995 is time barred. Respondent Wallach asserted this defense because he had no further involvement with the Petitioner after he returned her from promotional probation in August 1995. Petitioner offered inadmissible conjecture to suggest he had some involvement, but that is not sufficient to withstand a motion for summary judgment, particularly under summary judgment standards where individual defendants assert qualified immunity.

Turning to qualified immunity, Respondents Wallach and Weimer assert this defense because it is not clearly established that their conduct violated § 1981 – which prohibits only racial discrimination and retaliation. The doctrine of qualified immunity allows courts to expeditiously weed out suits against government officials which fail to establish a violation of a clearly established right prior to imposing the burdens of discovery and litigation. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Looking at only conduct occurring within the relevant two-year time

period, there are no admissible facts that would give rise to a cognizable claim under § 1981.

While the City may not avail itself of the issue preclusion defense enunciated in *University of Tennessee v. Elliot*, 478 U.S. 788 (1986), such a defense is available to the individual defendants as they are being sued under § 1981 — a Reconstruction Era Claim. As mentioned above, Petitioner filed unsuccessful appeals with a Hearing Officer of the Denver Career Service Authority alleging racial discrimination and retaliation. Under these circumstances, the Petitioner should not be allowed to relitigate her Reconstruction Era claim.

CONCLUSION

Based on the foregoing, the Respondents respectfully request the Court to deny the petition for writ of certiorari. There are no compelling reasons that meet the standards of Supreme Court Rule 10. Moreover, the Tenth Circuit properly affirmed summary judgment.

Respectfully submitted,

J. WALLACE WORTHAM, JR.
City Attorney
STEVEN WOODROW MOORE*
Assistant City Attorney
SYBIL R. KISKEN
Assistant City Attorney
1437 Bannock, Room 353
Denver, CO 80202-5375
(720) 913-3100

Counsel for Respondents

* *Counsel of Record*